IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-610

STEVEN RYAN, et al.,
Petitioners,

v.

AURORA CITY BOARD OF EDUCATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

EUGENE GREEN
P. O. Box 849
Youngstown, Ohio 44501
Attorney for Petitioners

Of Counsel
GREEN, SCHIAVONI, MURPHY & HAINES
P. O. Box 849
Youngstown, Ohio 44501

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

LIST OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Miscellaneous

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

STEVEN RYAN, et al.,
Petitioners,

v.

AURORA CITY BOARD OF EDUCATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on August 2, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet officially reported, is appended at Appendix pp. A1-A-14. The opinion of the United States District Court for the Northern District of Ohio is not officially reported and is appended at Appendix pp. A-15-A-37.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254(1). The judgment of the United States Court of Appeals for the Sixth Circuit (App. pp. A-1-A-14) was entered on August 2, 1976.

QUESTIONS PRESENTED

Whether a School Board's regulation, incorporated in a teacher's employment contract, reciting that a teacher who is not to be reappointed shall be given the reasons for non-reappointment and notified in writing on or before April 30th, and that a teacher not so notified shall be considered reappointed, confers upon a teacher a property interest protected by the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V (App. p. A-38)
2. United States Constitution, Amendment XIV (App. A. A-38)
3. Civil Rights Act of 1871, 42 U.S.C. Section 1983 (App. p. A-38)
4. Revised Code of Ohio, Sections 3313.20, 3319.11, and 3319.16 (App. pp. A-38-A-44)

STATEMENT OF THE CASE

Petitioners are four nontenured public school teachers who were employed under limited contracts of varying duration by the Aurora City School Board of Education. Petitioners were employed under the terms of school board adopted and publicized rules and regulations and individual employment

contracts. Each of the contracts provided that the contract would expire, unless renewed, at the end of the 1972-1973 school year, and each expressly recited that the teacher employed under the contract was required to abide by the rules and regulations of the Board.

Ohio law provides for two types of employment contracts for teachers, "continuing contracts" and "limited contracts."[1] A teacher holding a continuing contract has tenure and can only be terminated "for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."[2] A teacher holding a limited contract is entitled to the same protections during his contract term, but may be terminated at the end of his contract if the board of education notifies him by April 30th that his contract will not be renewed. Written reasons for nonrenewal are not required. In the absence of such notice, the teacher's contract is automatically renewed.[3]

Termination of teachers during term of contract, and the nonrenewal of teachers employed under continuing contracts, is subject to the procedural requirements of Ohio Revised Code Section 3319.16. These procedural requirements include the right of a teacher to be given full written specification of the grounds for nonrenewal, a hearing upon demand by either the teacher or by the board before a referee, with an opportunity to subpoena and cross-examine witnesses, a complete stenographic record of the hearing to be provided to the teacher, and the right of a court review of adverse determinations. No claim is made here that Petitioners' termination is subject to the procedural requirements of Section 3319.16.

---

[1] R.C. Section 3319.08

[2] R.C. Section 3319.16

[3] R.C. Section 3319.11

Pursuant to statutory authorization,[4] the Aurora Board of Education promulgated rules and regulations relating to the employment of teachers. These rules and regulations are set forth in a 1965 policy manual which was made available to Petitioners who, among other employment responsibilities, were required to comply with such rules and regulations. The Board's policy with respect to the renewal of nontenured teachers' contracts is set forth in the policy manual under the heading "[Ill.]4. Contracts", which recites:

> "(e) Teachers who are not to be reappointed shall be given the reasons and notified in writing by the clerk-treasurer of the school district as confirmed by the board of education on or before April 30. Such written notice to the teacher on non-re-employment shall not be necessary provided that the teacher, after having consulted with the superintendent of the schools, shall give to the board of education before April 30 a letter asking that he not be reappointed. All teachers not so notified shall be considered reappointed."

App. p. A-6.

Before April 30th of the 1972-1973 academic school year, Petitioners were notified in writing of the Board's intention not to renew their individual contracts, but the notification did not include the reasons for the nonrenewal. None of the Petitioners had waived the entitlement to written reasons by having given the Board, after consultation with the Superintendent of Schools, a letter asking not to be renewed. Notwithstanding, and in violation of the renewal guarantees of its agreements with Petitioners, the Board terminated Petitioners' employment contracts at the end of the school year.

On refusal of the Board of Education to renew Petitioners' contracts, or to explain its departure from its policy and contractual commitments, Petitioners sought relief in federal court under 42 U.S.C. Section 1983, 28 U.S.C. Section 1343(3)(4), 28 U.S.C. Section 2201, and 28 U.S.C. Section 1331. Petitioners' Complaint asserted a right to be reappointed under ordinary principles of contract law. Thus, the Complaint alleges that rules and regulations adopted by Defendant Board, applicable to Plaintiffs' employment, provided that before a teacher's contract of employment is not renewed the teacher will be given reasons for nonrenewal. Petitioners further recite that the Board of Education, without giving Plaintiffs any reason for its action or a hearing, arbitrarily and capriciously terminated Plaintiffs' employment and thus deprived Plaintiffs of property without due process of law, in violation of the Fourteenth Amendment.

[4] R.C. Section 3313.20 states: "The board of education shall make such rules and regulations as are necessary for its government and the government of its employees. . . ."

Petitioners did not contend that their employment contracts or the policy rules adopted by the Board mandated justifiable reasons for nonrenewal, or that their employment contracts or the policy rules adopted by the Board required that they be provided with the procedural rights of Revised Code Section 3319.16. On the contrary, their Complaint simply alleges that their contractual right to written reasons for nonrenewal is an enforceable property interest under the Fourteenth Amendment.

The District Court concluded that Petitioners had no property interest under the Fourteenth Amendment. It viewed the School Board's agreement to provide nontenured teachers whose contracts were not to be renewed with reasons as the equivalent of tenure, and as such a benefit beyond the statutory authority of the Board to confer. The Sixth Circuit Court of Appeals affirmed, holding that "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." App. A-10.

Petitioners seek review of this holding.

REASONS FOR GRANTING THE WRIT

I. The Decision Below, in Holding That a Statutory Tenure System Irrebuttably Bars a Nontenured Teacher From Asserting an Expectancy of Continued Employment, Decided an Important Question of Federal Law in a Way Which Directly Conflicts With the Decisions of This Court.

Petitioners claim that they had an expectancy of continued employment in the event that specified procedures were not followed. The decision below rejected this claim on the ground that it was beyond the statutory authority of the Board to agree to provide Petitioners with reasons for nonrenewal of their contracts. The Court's conclusion rests on the sweeping pronouncement which bars the finding of a property interest in continued employment for a nontenured teacher in a school system covered by a statutory tenure system, "whatever may be the policies of the institution." App. A-10.

The decision below misconstrues the nature of Petitioners' claim. Petitioners' insistence upon their right to receive written reasons for nonrenewal, in accord with the requirements of their contracts, is not a claim for the recognition of a status equivalent to statutory tenure. Nor does it assert a property interest inconsistent with the formal tenure system of the Ohio schools. Petitioners claim simply that the procedure for terminating their contracts is detailed in the regulations incorporated in their contracts and provides the Petitioners with the express assurance and expectancy that their employment will continue until terminated as specified.

Petitioners' expectancy of employment and right to be reappointed, where the procedures for terminating their employment have admittedly not been followed, is a property right under the controlling decisions of this Court. *Board of Regents*

v. Roth, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). There the Court declared that, for constitutional purposes, a property interest exists where there is a claim of entitlement to a benefit supported by rules or mutually explicit understandings. The Court stated in *Sindermann:*

> "We have made clear in Roth . . . that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'. . . . A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

408 U.S. at 61. The property interest asserted by Petitioners here is explicit, having been created by regulations adopted in Petitioners' contracts.

It may scarcely be maintained that this Court's holding that Sindermann would be entitled to procedural due process protection upon a showing that the circumstances of his employment gave rise to an expectancy of continued employment, requires or supports the conclusion that "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." App. p. A-10.

No court has explained this more clearly than the Sixth Circuit. In *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), the Court held that a nontenured teacher in a state university with a formal tenure system had acquired de facto tenure. As to *Sindermann*, the Court stated:

> "Appellants contend, however, that Dr. Soni could not have acquired a reasonable expectation of continued em-

ployment because the University of Tennessee had a well-established tenure system that would have prevented any expectancy from arising in a professor who had not been granted formal tenure status. We do not find this argument convincing. The Supreme Court has stated that a legitimate expectancy of continued employment 'is particularly likely in a college or university . . . that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.' Perry v. Sindermann, 408 U.S. 593, 602 (1972). *The Court did not say, as it easily could have, that a reasonable expectancy can not arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consder in analyzing the due process claim of a formally nontenured professor."*

513 F. 2d at 351 (emphasis added).

It is difficult to reconcile *Soni* with the decision below in this case. The Court's remark that *Soni* "involved a factual situation distinctly different from the facts of the case at bar" (App. p. A-11), hardly explains the conflict. Moreover, in *Soni* the Court, going far beyond what is urged here, found that a nontenured teacher who was not a citizen had achieved de facto tenure despite the Tennessee legislature's express statutory language denying tenure to non-citizens. The conflict between statute and the status implied from institutional policies was express in *Soni*, where the Court was willing to imply de facto tenure, whereas here, where the school board merely added to the guarantees provided by statute, the Court found the implication of an employment expectancy irrebuttably barred.

Agreeing with the view of *Sindermann* expressed by the Sixth Circuit in *Soni*, many lower courts have interpreted *Sindermann* to permit the implication of a property interest in employment from institutional policies despite the existence at the institu-

tion of a formal tenure system. *Johnson v. Fraley*, 470 F. 2d 179 (4th Cir. 1972); *Cardinale v. Washington Technical Institute*, 500 F. 2d 791 (D.C. Cir. 1974); *Bruce v. Board of Regents for N.W. Mo. State Univ.*, 414 F. Supp. 559 (W.D. Mo. 1976); *Francis v. Ota*, 356 F. Supp. 1029 (D. Hawaii 1973); *Gordenstein v. University of Delaware*, 381 F. Supp. 718 (D. Dela. 1974); *Assaf v. University of Texas System*, 399 F. Supp. 1245 (D. Tex. 1975).

Only this Court can resolve the directly conflicting interpretations of *Sindermann* and its progeny represented by the decision below on the one hand, and by *Soni* and the decisions cited supporting the contentions of Petitioners here on the other.

II. The Holding of the Court Below That the Board Was Not Required to Comply With Its Commitment to Give Written Reasons in Its Notice of Nonrenewal Is in Conflict With the Decisions of Other Courts of Appeal.

It is undisputed that here the Board had committed itself to provide nontenured teachers with written reasons where the Board determined it would not renew an existing contract. Nor is there any dispute over the failure of the Board to provide Petitioners with written reasons. Noncompliance with the obligation is justified on the ground that the commitment is not enforceable because beyond the statutory authority of the Board, and so beyond the pale of federal jurisdiction. This conclusion is in direct conflict with the holdings of the Fourth, Ninth, and District of Columbia Circuit Courts of Appeal.

Concededly, the Aurora Board of Education "enlarg[ed] the procedural protections accorded by the Act itself," *Arnett v. Kennedy*, 416 U.S. 134, 142 (1974). Petitioners claim that the Board is bound to honor the procedural protection voluntarily conferred. The principle relied upon by Petitioners was memorably expressed by Justice Frankfurter in *Vitarelli v. Seaton*, 359 U.S. 535 (1959), as follows:

"Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. . . .This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

359 U.S. at 546-547 (concurring).

This principle has been applied by the Fourth Circuit Court of Appeals in a way which conflicts directly with the decision below in this case. In *Prince v. Bridges*, 537 F. 2d 1269 (4th Cir. 1976), the Court characterized a public employee's right to rely upon the administrative procedural protections provided by the employing agency as a property right. Thus, the Court stated:

"A constitutional guarantee of procedural due process arises when a public employee is discharged in violation of the procedural rules designed to protect him. In such a situation he has a legitimate 'property' interest to protect."

537 F. 2d at 1272. The Fourth Circuit has consistently adopted this approach in cases involving termination of nontenured teachers. *Johnson v. Fraley*, 470 F. 2d 179 (4th Cir. 1972) (allegations of teacher's complaint were sufficient to establish a "property" interest even though she did not qualify for tenure under applicable statute); *Thomas v. Ward*, 529 F. 2d 916 (4th Cir. 1975) (language of Handbook for Professional Personnel created property interest under *Sindermann*); *Sigmon v. Poe*, 528 F. 2d 311 (4th Cir. 1975) (where state statute forbade nonrenewal of probationary teachers for "arbitrary, capricious, discriminatory or for personal or political reasons," and where school practice required principals to inform in the fall employees whom they intended to rate as unsatisfactory, failure so to inform a probationary employee until late the next spring gave rise to property interest under Fourteenth Amendment).

The District of Columbia Circuit agrees with the Fourth Circuit. *Greene v. Howard University*, 412 F. 2d 1128 (D.C. Cir. 1969) (even a private university's failure to follow its rules and regulations gives rise to a protectable property interest); *Cardinale v. Washington Technical Institute*, 500 F. 2d 791 (D.C. Cir. 1974) (public university's policies which provided that nontenured teacher who did not receive termination notice by March 1 would be entitled to employment for another year, provided meritorious foundation for claim under *Sindermann*). These decisions are directly in conflict with the decision below in this case.

The Ninth Circuit also agrees with the Fourth Circuit, although it characterizes the right involved as a right to administrative due process. *Mabey v. Reagan*, 537 F. 2d 1036 (9th Cir. 1976) (if a college's own rules dictate that certain procedures will be used when an untenured instructor is not reappointed, it is bound to follow them).*

The cases cited above reveal a conflict in the circuits. The principal decisions cited have come down in the last three years. The issue is a recurrent one involving thousands of teachers and school boards in every circuit in the nation. The extent of the disagreement among the circuits can be resolved only by this Court.

---

* See also the dictum of the Eighth Circuit: "School boards might better serve themselves as well as school personnel if they devised rules and regulations setting out more specifically the rights of the parties and the procedures to be followed under the statute. *If they do, of course, such regulations would have to be followed.*" *Brouillette v. Board of Directors of Merged Area IX*, 519 F. 2d 126, 128 n. 1 (8th Cir. 1975) (emphasis added).

III. **The Decision Below Decides an Important State Question in a Way in Conflict With Applicable State Law.**

The federal right asserted by Petitioners stems from the rights conferred by state law. There is no disagreement that Petitioners' property rights, if any, are created and their dimensions defined by existing rules or understandings that flow from state law. *Roth, supra,* at 577. It is, therefore, imperative that state law be correctly understood and applied. Petitioners will show that the interpretation of state law in the decision below conflicts with Ohio law as declared by the Supreme Court of Ohio, and by every other District Court decision which has considered the question presented here.

It is not without significance that the decision below cites no decision of the Supreme Court of Ohio, and neglects lower state court and District Court decisions involving the authority of boards of education in Ohio to adopt rules and regulations under Ohio Revised Code Section 3313.20 for the government of their employees.[5]

The leading Supreme Court of Ohio cases interpreting the authority of school boards to make rules and regulations pursuant to Revised Code Section 3313.20 are *State ex rel. Ohio School Athletic Assn. v. Judges of the Court of Common Pleas of Stark County*, 173 Ohio St. 239, 181 N.E. 2d 281 (1962);

[5] Cf. the forty-eight annotations under Revised Code Section 3313.20 in PAGE'S REVISED OHIO CODE (1972 ed. and 1975 SUPPLEMENT) e.g., *Greco v. Roper,* 145 Ohio St. 243, 61 N.E. 2d 307 (1945) (under the statutes of Ohio, a board of education is charged with the management and control of the public schools in its district and is vested with authority to make such rules and regulations as it deems necessary for its government and the government of its employees); *Holroyd v. Eibling,* 116 Ohio. App. 440, 188 N.E. 2d 797 (1962) (a court will not interfere with the authority of a local board of education to make rules and regulations concerning, nor substitute its judgment for that of the board in, the conduct of the affairs of a school, in the absence of fraud, abuse of discretion or arbitrariness or unreasonableness).

and *Dayton Teachers Association v. Dayton Board of Education,* 41 Ohio St. 2d 127, 323 N.E. 2d 714 (1975).

In *Athletic Assn.*, the Supreme Court of Ohio held that a school board had authority to affiliate with the State high school athletic association and to bind itself to observe the association's constitution, rules and bylaws. The Court cited a line of its decisions dating back to 1909 for the proposition that state law gives boards of education authority to issue rules and regulations, and that so long as the rules are reasonable, fairly calculated to insure good government and promote the end of education, and issued in good faith and in a lawful manner, that authority will be sustained by Ohio courts. 173 Ohio St. at 245-246.

Similarly, in *Dayton Teachers Association,* the Court considered a school board's authority to make rules and regulations, with particular reference to collective bargaining agreements. There, as here, the defendant school board argued that although it had made written agreements with its employees, it was not bound to observe those agreements because it had lacked authority to make them. 41 Ohio St.2d at 130-131. After quoting the pertinent statutory language, including Revised Code Section 3313.20, the Court stated:

> "From the foregoing, we conclude that a board of education has been granted broad discretionary powers in its dual role of manager of schools and employer of teachers.
>
> "Our research discloses that agreements entered into by boards of education are generally invalidated by courts upon unlawful-delegation grounds only when the board seeks to absolve itself of the duties acquired thereunder.
>
> "On the other hand, where a school board has benefited from an agreement and seeks to have it upheld, the courts generally apply normal principles of contract law to test the contract's validity and binding effect.
>
> * * * * * * *

"Accordingly, we hold that a board of education is vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees."

41 Ohio St. 2d at 131-132.

Nor can it be doubted that the Supreme Court of Ohio would find that rules and regulations promulgated by a board of education, and recognized in individual employment contracts, become part of those contracts. In *Rehor v. Case Western Reserve University*, 43 Ohio St. 2d 224, 331 N.E. 2d 416 (1975), the Court held that where a university faculty member is employed, using standard annual reappointment forms which do not set forth in full the terms and conditions of employment, the university's rules and regulations became part of the employment contract between the university and the faculty member. The Court made no distinction between tenured and nontenured faculty members, and approvingly quoted the opinion of the court below wherein cases involving both systems with and systems without a formal tenure system were cited interchangeably. 43 Ohio St. 2d at 230 n. 2.

The Supreme Court's holdings concerning the authority of boards of education under Revised Code Section 3313.20 are consistent with the decision of the State Court of Appeals in *Wheeler v. Board of Education of Cleveland Heights*, 30 Ohio App. 2d 136, 283 N.E. 2d 652 (1972). There the Court affirmed the principle that a board's action is illegal only if "outside of and against the plain provisions of the law." 30 Ohio App. 2d at 143. In support of this interpretation of Revised Code Section 3313.20, the Court quoted with approval the exposition of Ohio law at 48 Ohio Jur. 2d 786, *Schools*, Section 84, which recites:

"The Code empowers a board of education to make such rules and regulations as are necessary for its government and the government of its employees and the pupils of the schools. The presumption is always in favor of the

reasonableness and propriety of any such rule duly adopted. This statute, together with the general statutes concerning the powers of such boards, confers upon such boards plenary authority and responsibility for the proper conduct, control, regulation, and supervision of its employees, the pupils, and the entire school system of the district. Its authority in these respects is unlimited except to the extent that it is curtailed by express law. The board is bound by the rules and regulations thus made for its government, unless suspended in a legal manner, and, in the absence of fraud, abuse of discretion, arbitrariness, or unreasonableness, a court will not interfere with the authority of the board of education to make rules and regulations nor substitute its judgment for that of the board on matters delegated to it to decide in conducting the affairs of the schools."

30 Ohio App. 2d at 142-143.

Federal District Courts have similarly interpreted Revised Code Section 3313.20. In *Burkett v. Tuslaw Local School District*, Civ. C 74-116 Y (N.D. Ohio 1974) (App. pp. A-45-A-50), an Ohio teacher under a limited contract claimed that she had been discharged in violation of a local school board policy dealing with procedures for non-reappointment Although finding that the board had followed the procedures it had promulgated, the court stated the law as follows:

"In the instant case, Section 30.342 of the Board of Education policies creates a protectable property interest, and were said section to have been breached, this Court would be of the opinion that plaintiff would have a protectable property interest under the due process clause of the Fifth and Fourteenth Amendments."

App. p. A-48.

In *Scott v. Joseph Badger Local School District Board of Education*, Civ. C74-143 Y (N.D. Ohio 1974) (App. pp.

A-51-A-55), the school board had promulgated a policy nearly identical to that at issue here. The policy manual provided:

> "Teachers who are not to be reappointed shall have their deficiencies listed and shall be notified of same in writing by the Superintendent of schools as confirmed by the Board on or before April 30th. All teachers not so notified shall be considered reappointed."

App. pp. A-51-52. The Court found for the discharged teachers, stating the law as follows:

> "It is the finding of this Court that the regulations established by the School Board in their handbook and distributed to each of the teachers did, in fact, establish a property interest and an expectancy of reemployment. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 and Perry v. Sindermann, 408 U.S. 593.
>
> "The Court finds that as a matter of law under Ohio Revised Code, Section 3511.19 [3319.11], there is no requirement to list deficiencies of teachers upon a decision by a School Board not to renew their contract. However, the Court finds that, as a matter of fact, the regulations in effect and in the possession of the plaintiffs in the instant action established and created a procedure that went beyond the minimal requirements of the Ohio Revised Code. The defendants in so doing gave rise to a legitimate expectancy of reemployment until and unless the procedures outlined in the regulations handbook were met. See Green v. Howard University, 412 F. 2d 1128 (C.A. D.C. 1969)."

App. p. A-53.

Similarly, in *Sekeres v. Stark County Board of Education*, Civ. C 75-93 A (N.D. Ohio 1975) (App. pp. A-56-A-59), another judge of the same court came to a similar conclusion. The Court stated the law with regard to the regulations at issue in that case as follows:

> "The Board chose to enact Sections 4.16(D) and (E) to set forth how its employees would be treated. The Board was not obligated to provide these protections but it did. Plaintiff was aware of these provisions and was entitled to rely on them for protection. She developed a legitimate expectancy of continued employment and was entitled to have the Board follow its own regulations as to terminating her employment."

App. p. A-57.

In sum, state law is with the Petitioners, and the decision below is clearly erroneous in purporting to base itself on settled state law.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

EUGENE GREEN
P. O. Box 849
Youngstown, Ohio 44501
Attorney for Petitioner

Of Counsel:
GREEN, SCHIAVONI, MURPHY & HAINES
P. O. Box 849
Youngstown, Ohio 44501

APPENDIX

No. 75-2067

United States Court of Appeals for the Sixth Circuit

Steven Ryan, et al.,
Plaintiffs-Appellants,
v.
Aurora City Board of Education, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed August 2, 1976

Before: Phillips, Chief Judge and Weick and Adams,* Circuit Judges.

Phillips, Chief Judge. This appeal presents the recurring problem of non-tenured teachers whose contracts of employment are not renewed and who claim due process rights under *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). Plaintiffs Ryan, Miller, Felver and Touby were non-tenured public school teachers employed by the Aurora, Ohio, school system under limited contracts of varying duration, all of which expired at the end of the 1972-73 school year. On April 25, 1973, the Aurora City Board of Education (the Board), acting pursuant to § 3319.11 of the Ohio Revised Code,[1] voted not to renew their contracts.

---

* Honorable Arlin M. Adams, Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

[1] Section 3319.11 provides in part as follows:

> Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed reemployed under

Consistent with this statutory provision, the Board did not provide plaintiffs a hearing, nor did it give any reasons for its action. District Judge William K. Thomas concluded that the Board's regulations, which provided for written reasons to be given to the teachers whose contracts were not renewed, does not create an "expectancy of continued employment" where the teachers are non-tenured under Ohio law. We hold that a teacher who is non-tenured under state law does not have a "legitimate claim of entitlement" to continued employment within the meaning of *Roth* and *Sindermann*. Accordingly, we affirm the District Court.

I

Plaintiff Steven Ryan had been employed in 1967 as a science teacher in the Aurora Middle School (grades 6, 7 and 8) on a one year contract. In 1968, he was reemployed on a five year limited contract. Plaintiff Joan Felver had been first employed to teach home economics in 1966 in the high school under a one year limited contract. Thereafter, she had been reemployed to teach the same subject on additional limited contracts for one year, two years, three years and one year. Plaintiff James Miller, hired first in 1968, had taught mathematics in the middle school under five successive one year limited contracts. Plaintiff Clair R. Touby had been employed in 1971 to teach music in both the high school and elementary school. He had two one year contracts.

During a specially scheduled public meeting on April 25, 1973, the Board took up the subject of the non-renewal of the plaintiffs' contracts. A two hour discussion followed in which

---

the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April.

the public participated. At the conclusion of the discussion the Board unanimously adopted the following resolution: "[It is moved that] consistent with section 3319.11 of the Ohio Revised Code, the [designated] teachers be notified that their contracts which expire at the conclusion of the 72/73 school year, not be renewed." In voting not to renew these contracts, the Board followed the recommendation of Superintendent of Schools Paul Snyder. Pursuant to § 3319.11 of the Ohio Revised Code, each plaintiff was given written notification before the 30th day of April, 1973. In a letter dated April 26, 1973, the Board's clerk-treasurer informed each plaintiff of the Board's: "intention not to re-employ you at the expiration of your current limited contract as teacher in the schools of this district consistent with Section 3319.11 of the Revised Code of Ohio."

Ohio, like many other states, has enacted statutes under which tenure rights may be conferred upon teachers after a period of probationary employment. In *Orr v. Trinter*, 444 F. 2d 132 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), in construing the same Ohio statutes that are before us in the present case, this court said:

> [W]e emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education, 444 F.2d at 135.

Under Ohio Rev. Code § 3319.08, contracts for the employment of teachers are of two types, limited contracts (non-

tenured) and continuing contracts (tenured). This section further provides:

> A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates.

Section 3319.16 makes termination of any contract during its term subject to cause. Accordingly, since "continuing contracts" are of indefinite duration, this provision has the effect of conferring tenure on teachers with "continuing contracts."

Section 3319.11 defines requirements and procedures for renewal and non-renewal of limited contracts and for initially acquiring continuing contract status. The statute delineates only three situations recognized by Ohio law in which a teacher whose limited contract is about to expire can acquire a right to reemployment without action by the Board to offer continued employment. Limited contract teachers who meet eligibility requirements (e.g., years of service, appropriate teaching certification) for continuing contracts, have a right to reemployment on a continuing contract if: (1) the superintendent recommends a continuing contract and the Board fails to reject this recommendation by a three-fourths vote and to notify the teacher to that effect by April 30; or (2) the Board fails to send notice with reasons by April 30 of its action on a recommendation by the superintendent that the teacher be offered another limited contract rather than a continuing contract. A teacher employed under a limited contract, and not eligible to be considered for a continuing contract, can acquire a right of reemployment on a limited contract only if the Board fails to send written notice by April 30 (without reasons) of its decision not to renew the teacher's limited contract. (Section 3319.11 quoted in n. 1.)

Appellants do not claim the above specific statutory tenure scheme confers rights on them. They assert, however, that the Board's regulations contained in a 1965 Policy Manual gave them a "property" interest in their jobs. Appellants rely on the following provisions of the Policy Manual to support their allegation of *implied* tenure:

> 2. *Chapter II. Instructional Personnel.*
>
> A. Administrative Organization
>
> . . .
>
> 2. Principals
>
> . . .
>
> (b) General Duties
>
> . . .
>
> (c) Specific Duties
>
> . . .
>
> (11) Hold at least one conference *and one classroom visit each year with teacher personnel*, in regard to their individual growth contribution to the educational program and making such suggestions for continuous improvement as necessary and reporting such conferences in writing to the conferees. *If a person's work is unsatisfactory, specific suggestions for improvement shall be made in the conference report.* Subsequent written reports shall confirm progress made and *provide a basis for reappointment.* The superintendent shall receive "The Teacher Evaluation Sheet" from the evaluation report for each teacher with the principal's recommendation for reappointment or dismissal by March 1 of each year. Any teacher recommended for dismissal must have been clearly informed of his status by the superintendent and completely aware that such a *recommendation is being made with definite reasons for same.*
>
> *Chapter III. Duties and Responsibilities of Instructional Staff.*
>
> . . .

4. Contracts

. . .

(e) Teachers who are *not to be reappointed shall be given the reasons* and notified in writing by the clerk-treasurer of the school district as confirmed by the board of education on or before April 30. Such written notice to the teacher on non-re-employment shall not be necessary provided that the teacher, after having consulted with the superintendent of the schools, shall give to the board of education before April 30 a letter asking that he not be reappointed. All teachers not so notified shall be considered reappointed. (emphasis added).

In *Orr* this court recognized that a due process hearing must be accorded a non-tenured teacher if his contract is not renewed because he exercised his rights of free speech as guaranteed by the first amendment; or if the non-renewal is in violation of the self-incrimination clause of the fifth amendment, the due process clause of the fifth or fourteenth amendment, or the equal protection clause of the fourteenth amendment. *Accord: Halton v. County Board of Education*, 422 F.2d 457 (6th Cir. 1970); *Rolfe v. County Board of Education*, 391 F.2d 77 (6th Cir. 1968). We said: "These are constitutionally impermissible reasons for refusal to rehire a teacher." 444 F.2d at 134.

The present case, however, does not invoke a question of free speech, self-incrimination, or equal protection. Rather, the appellants are alleging a fourteenth amendment procedural due process violation on the argument that the Board's regulations have created a "property" interest in their employment under the authority of *Roth* and *Sindermann*. In particular, they argue the regulations of the board contain a clearly implied promise under *Roth*, 408 U.S. at 577, that limited-contract teachers would be renewed unless there are valid reasons for nonrenewal, thereby creating a "property" interest in continued employment.

Section 1983 was never intended as a catch-all statute under which myriads of suits, traditionally within the exclusive jurisdiction of state courts, may be filed in the federal courts in the absence of a showing of deprivation of a constitutional right.[2]

[2] One of the most recent applications by the Supreme Court of the "property" and "liberty" requirements of the fourteenth amendment appears in *Paul, Chief of Police of Louisville v. Davis*, — U.S. —, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976), *rev'g*, 505 F.2d 1180 (6th Cir. 1974). In that case the police department of the City of Louisville had distributed to merchants a flyer containing a picture of plaintiff and describing him as a "known shoplifter." The plaintiff had been arrested once for shoplifting but the charge had been "filed away" and never prosecuted. No court had ever found him guilty of shoplifting. The Supreme Court held that the plaintiff could not maintain an action under 42 U.S.C. § 1983 because the State law of Kentucky did not extend to plaintiff "any legal guarantee of present enjoyment of reputation." Under the rationale of that decision, assuredly the appellants in the present case, who have not been defamed in any way, but whose limited contracts were not renewed, with no recitation of reasons, have no right to maintain an action under § 1983, as they undertake to do in the present case.

The Supreme Court said in *Paul*:

> Kentucky law does not extend to respondent any legal *guarantee* of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" *guaranteed* against state deprivation without due process of law.
>
> Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause. (Emphasis added.) Slip opinion pp. 18-19.

The State law of Ohio does not guarantee to plaintiffs, who are non-tenured teachers, any right to a hearing of "statement of reasons" as a prerequisite to non-renewal of a contract of employment.

It is the rule of this Circuit that judicial review in actions of school authorities involving the administration of State Teacher Tenure Laws is in the State courts,[3] not the federal courts, with the exception of cases involving deprivation of rights delineated by this court in *Orr*, as summarized above.

In *Coe v. Bogart*, 519 F.2d 10, 13 (6th Cir. 1975), this court, speaking through Judge Engel, said:

> Coe also contends that Judge Taylor abused his discretion in refusing to consider his pendent claim under the Teacher Tenure Act. Although an analysis of Coe's federal claim required reference to Tennessee law, particularly the Teacher Tenure Act, we agree with Judge Taylor that a determination of the merits of that claim should be more appropriately made by the state courts. *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

In *Manchester v. Lewis*, 507 F.2d 289, 291 (6th Cir. 1974), we said:

> Manchester relies upon Mich. Comp.Laws Ann. § 38.83, which is part of the Teachers' Tenure Law of Michigan. He complains that some of the reasons assigned by school authorities for denying tenure occurred during his first year of employment as a probationary teacher.
>
> Review of actions of school authorities under the Teachers' Tenure Law of Michigan is the prerogative of the courts of that State and not of the federal judiciary. Jurisdiction cannot be conferred on federal courts by the procedural device of filing an unsubstantial action under § 1983 and relying on the doctrine of pendent jurisdiction. Bates v. Dause, *supra*, 502 F.2d at 867. In this § 1983 action determination of whether the constitutional rights of Manchester were violated is not controlled by § 38.83.

[3] The Supreme Court further held in *Paul* that if plaintiff had a right of action his remedy was a suit for defamation in the State courts of Kentucky, and not a suit in the federal courts under § 1983. The Court said:

> Respondent brought his action, however, not in the state courts of Kentucky but in a United States District Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.

In *Bates v. Dause*, 502 F.2d 865, 867 (6th Cir. 1974), we said:

> An action was brought against the Superintendent of Schools and certain members of the Board of Education in their individual capacities under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. By amendments to the pleadings, plaintiffs also asserted that their claims under the State Teachers' Tenure Statute were cognizable in federal court on the theory of pendent jurisdiction. The District Court assumed pendent jurisdiction and rendered judgments of $5,948 in favor of one principal and $8,175 in favor of the other, against the Superintendent of Schools and four members of the Board of Education, all in their individual capacities.
>
> We reverse on the ground that the record shows no deprivation of any rights, privileges or immunities of appellees secured by the Constitution and laws of the United States so as to support an action under § 1983; and that, since the federal claim does not have substance sufficient to confer subject matter jurisdiction on the District Court, that court erred in assuming pendent juris-

diction under the Kentucky Teachers' Tenure Act and the common law of Kentucky.

* * * * * * *

This statute should be administered by the Courts of the Commonwealth of Kentucky, and not by the federal judiciary. Transfer of jurisdiction to federal courts cannot be accomplished by the procedural device of filing an unsubstantial action under § 1983, coupled with a prayer for exercise of pendent jurisdiction. (Footnote omitted.)

A non-tenured teacher may acquire an "expectancy" of continued employment where "the policies and practices of the institution" rise to the level of implied tenure. *See, Sindermann*, 408 U.S. at 603; *Patrone v. Howland Board of Education*, 472 F.2d 159, 160 (6th Cir. 1972); *Lukac v. Acocks*, 466 F.2d 577, 578 (6th Cir. 1972). We hold, however, that a non-tenured teacher has no "expectancy" of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system. *See Patrone*, 472 F.2d at 160-61; *Lukac*, 466 F.2d at 578; *Orr*, 444 F.2d 132-33.[4] *See also Blair v. Board of Regents*, 496 F.2d 322 (6th Cir. 1974). Since property interests are created by state law and not the Constitution, *Roth* at 577, the fact that the State limits the guarantee to only tenured teachers, necessarily negatives any property interest.

This conclusion is supported by the Supreme Court's decision in *Sindermann*. There the Court stated the effects of a state law tenure system upon a claim of entitlement to implied job tenure:

---

[4] *Patrone, Lukac* and *Orr* involved the same statutory section before us on this appeal—Ohio Rev. Code § 3319.11. In each of those cases we held that the non-tenured plaintiffs had no expectancy of continued employment. Although these decisions relied upon the lack of evidence which might be construed to establish an expectancy of continued employment, the existence of a statutory tenure system was an additional factor which negatived any "expectancy."

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law . . .*" *Board of Regents v. Roth, supra*, at 577. *If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated*. 408 U.S. at 602 n. 7. (Emphasis added.)

The fact that Ohio already has an explicit tenure policy obviates the need, which existed in *Sindermann*, to supply one by implication.

The Supreme Court recently stated in *Bishop v. Wood*, — U.S. —, 44 U.S.L.W. 4820 (U.S. June 10, 1976), that the sufficiency of a claim of entitlement to a property interest in employment must be decided by a reference to state law even if the entitlement is based on an implied contract theory. 44 U.S.L.W. 4821.

Appellants rely upon the opinion of this court in *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (1975). *Soni* has no application in the present case; it involved a factual situation distinctly different from the facts of the case at bar.

II

Plaintiffs contend that even if they are not entitled to a hearing under the authority of *Roth* and *Sindermann*, they at least are entitled to the protections prescribed by the Board's own regulations. They complain that the Board did not adopt any statement of "reasons" for its action, and did not give any "reasons" in its notice of non-renewal, as required by its rules.

In an opinion by Circuit Judge John Paul Stevens in *Jeffries*

v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974), the court held that a non-tenured teacher can be dismissed for no stated reasons, or for voluntarily offered reasons unsupported by factual evidence, without violating due process:

> In our opinion, the questions whether a nontenured teacher, whose contract is not renewed, has any right to a statement of reasons or to judicial review of the adequacy or accuracy of such a statement are *matters of state law, not federal constitutional law*. There are sound policy reasons to support either a statutory requirement, or an administrative practice, that the complete and accurate written statement of the reasons for such an important decision be promptly delivered to the teacher. *But since, by hypothesis, no constitutionally protected property or liberty interest of the teacher is impaired by the Board's action, she has no federally protected right to a fair hearing or to a fair statement of reasons.* The fact that a state, or a School Board, *may voluntarily communicate more information to her, or receive more information from her, than the Constitution requires, is ont in itself sufficient to create a federal right that does not otherwise exist.*
>
> A written statement of reasons may have great significance as evidence, for example, that a particular Board decision was motivated by a constitutionally impermissible reason. And, of course, an adequate statement by the defendants would not foreclose a claim that the Board was, in fact, motivated by a forbidden purpose. *But the statement itself is just evidence, not an aspect of the state's legal process that is subject to federal supervision and control mandated by the United States Constitution.*
>
> Putting the statement of reasons to one side, plaintiff alleges that the Board decision was itself *completely without basis in fact or logic*, and argues that such an arbitrary and capricious action violates her constitutional right to "substantive due process."
>
> * * *
>
> *For the same critical objection to any procedural due process claim by the plaintiff also forecloses her argument based on "substantive due process."* (Emphasis added.) 492 F.2d at 3-4.

Accord, Buhr v. Buffalo Public School District No. 38, 509 F.2d 1196 (8th Cir. 1974). We agree with the reasoning of the Seventh Circuit. The fact that the Board may voluntarily offer "reasons" by its policies does not in itself create a federal right that does not otherwise exist. No matter what provision may have been contained in the Board's regulations with respect to "reasons" for non-renewal of the contracts of plaintiffs there would be no right to substantive due process under the *Jeffries* decision.

We agree with the opinion of Judge Thomas in the present case that:

> A school board may not limit its exercise of its admitted statutory power under section 3319.11 not to reemploy a teacher on limited contract, by self-imposing a requirement that it give written reasons for nonrenewal in addition to the sole statutory requirement that the board give written notice of nonrenewal before April 30, To condition the Board's exercise of its power under section 3319.11 on the giving of reasons in effect would make the termination of a teacher, employed under a limited contract, subject to cause. But only teachers who have tenure are entitled to an expectancy of employment terminable only for cause. As earlier explicated the first paragraph of Ohio Rev. Code § 3319.11 fixes the tenure procedures for teachers in Ohio's public schools. Patently no board of education has the authority or power to

enlarge the limits of teacher tenure beyond those limits. Indeed, the Aurora School District policy book, on which plaintiffs rely, frankly and correctly concedes,

> In developing rules and regulations, it cannot adopt standards which enlarge its authority or that of its employees beyond the statutory limits.

This is in accord with the decision of this court in *Orr*, where we said:

> In the present case Orr seeks to persuade this court to render a decision which would confer certain tenure privileges upon non-tenured teachers—in effect to amend the Ohio statute by judicial decree. This we decline to do. 444 F.2d at 135.

As stated in *Jeffries*, the statement of reasons and their adequacy or accuracy are matters of state law, not federal constitutional law. *See also, Coe v. Bogart*, 519 F.2d 10, 13 (6th Cir. 1975); *Manchester v. Lewis*, 507 F.2d 289, 291 (6th Cir. 1974); *Bates v. Dause*, 502 F.2d 865, 867 (6th Cir. 1974).

Accordingly, the decision of the District Court is affirmed.

United States District Court
Northern District of Ohio
Eastern Division

Steven Ryan, et al., Plaintiffs, v. The Aurora City Board of Education, et al., Defendants.	}	Civil Action No. C 73-1138

MEMORANDUM AND ORDER

Thomas, J.

Plaintiffs Steven E. Ryan, D. Joan Felver, James E. Miller, and Clair R. Touby bring an action, based on 42 U.S.C. § 1983, against their former employer, the Aurora City Board of Education (hereafter Board) and against the five members of the Board in their official and individual capacities. The jurisdiction of this court is invoked under 28 U.S.C. § 1343.

Claiming that the nonrenewal of their employment contracts as teachers in the Aurora City school system has deprived them of property rights in their employment without due process of law,[1] each plaintiff seeks reinstatement as a teacher in the system, back pay for time that has ensued since the end of the 1972-73 school year, and attorney fees.

---

[1] In their complaint the plaintiffs assert a violation of First Amendment rights. These claims were abandoned by three of the plaintiffs at the beginning of the trial. At the end of the evidence presented by plaintiff Steven Ryan, judgment was granted against him because of insufficiency of the evidence on his claim that his First Amendment associational rights, in connection with his activities with the Aurora Education Association, suffered deprivation.

The case was tried April 14-17, 1975, on the joint complaint of the plaintiffs, answers of the defendant Board and school board members, oral testimony, exhibits, and trial briefs. At the conclusion of all the evidence the court heard oral argument.

I

At a specially scheduled public meeting on April 25, 1973, the Board took up the subject of the nonrenewal of the contracts of four high school teachers and five middle school teachers. At the conclusion of a two-hour discussion in which the public participated the Board members unanimously adopted this resolution:

> [It is moved that] consistent with section 3319.11 of the Ohio Revised Code, the [designated] teachers be notified that their contracts which expire at the conclusion of the 72/73 school year, not be renewed.

In voting not to renew these contracts the Board followed the recommendations of Superintendent of Schools Paul Snyder. Among the nine teachers not renewed were the four plaintiffs.

Plaintiff Steven Ryan had been employed in 1967 as a science teacher in the Aurora Middle School (grades 6, 7, and 8 on a one-year contract. In 1968 he was reemployed on five-year limited contract.

Plaintiff Joan Felver had been first employed to teach home economics in 1966 in the high school under a one-year limited contract. Thereafter she had been reemployed to teach the same subject on additional limited contracts for one year, two years, three years, and one year.

Plaintiff James Miller, hired first in 1968, had taught mathematics in the middle school under five successive one-year limited contracts.

Plaintiff Clair R. Touby had been employed in 1971 to teach music in both the high school and the elementary school. He had had two one-year limited contracts.

Under Ohio Rev. Code § 3319.08 "contracts for the employment of teachers [are] of two types, limited contracts and continuing contracts." This section further provides:

> A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates.

Plaintiff Ryan had a professional certificate (valid for eight years) and, thus, he alone of the plaintiffs was eligible in 1973 for reemployment under a continuing contract, i.e., eligible for teacher tenure. He otherwise qualified under Ohio Rev. Code § 3319.11 for a continuing contract at Aurora since "within the last five years" he had "taught for at least three years in the district." Each of the other plaintiffs had a provisional teaching certificate (valid for four years but renewable). Plaintiffs Felver and Miller had taught in the Aurora School District long enough to qualify under Ohio Rev. Code § 3319.11 for continuing contracts. But lacking professional certificates neither could qualify for a continuing contract.

Ohio Rev. Code § 3319.11 is mentioned in the Board's resolution as the basis for nonrenewal of the contracts of the designated teachers. It has multiple provisions that prescribe the procedures for the employment of teachers by boards of education under both continuing and limited contracts. In part, the section prescribes a two-year limitation and other conditions on a limited contract appointment given before April 30 to a teacher eligible for a continuing contract, but not appointed

to a continuing contract. By another provision a teacher employed under a limited contract and not eligible for a continuing contract, is deemed reemployed

> unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April.

Thus, this section provides that written notice of non-renewal of a teacher's contract must be given to the teacher by the "employing board . . . on or before the thirtieth day of April." Section 3319.11 contains no provision that requires the board to give the teacher reasons (oral or written) for nonrenewal.

Before the 30th day of April, 1973, each plaintiff was advised of the Board's adoption of its resolution. In a letter dated April 26, 1973, the Board's clerk-treasurer informed each plaintiff of the Board's

> intention not to re-employ you at the expiration of your current limited contract as teacher in the schools of this district consistent with Section 3319.11 of the Revised Code of Ohio.

As is evident, this letter gave no reason for the nonrenewal. Plaintiffs do not contend that section 3319.11 requires that the Board notice of nonrenewal should contain reasons. Moreover, their limited contracts having expired, each plaintiff testified that the Board had the right to make the decision on reemployment. Nevertheless, the plaintiffs argue:

> Board of Education policies, rules and regulations created an expectancy of continued employment and provided each of the Plaintiffs with a protectible property interest. Despite the explicit Board promulgated evaluation and nonrenewal policies . . . the Board, through its administrators, failed to comply with these institutional employment rules and regulations.

Plaintiffs here are referring to "The Aurora Local School District General Policies and Duties, Rules and Regulations," known as the policy book. They particularly charge the defendants with violations of the provisions of the policy book that relate to teacher evaluations; and the giving of reasons to teachers not to be reappointed. Hereafter referred to as subsections (11) and 4(e), these are set forth in the margin.[2]

---

[2] *Chapter II. Instructional Personnel*

A. Administrative Organization

. . .

2. Principals

. . .

(b) General Duties

. . .

(c) Specific Duties

. . .

(11) Hold at least one conference and one classroom visit each year with teacher personnel, in regard to their individual growth contribution to the educational program and making such suggestions for continuous improvement as necessary and reporting such conferences in writing to the conferees. If a person's work is unsatisfactory, specific suggestions for improvement shall be made in the conference report. Subsequent written reports shall confirm progress made and provide a basis for reappointment. The superintendent shall receive "The Teacher Evaluation Sheet" from the evaluation report for each teacher with the principal's recommendation for reappointment or dismissal by March 1 of each year. Any teacher recommended for dismissal must have been clearly informed of his status by the superintendent and completely aware that such a recommendation is being made with definite reasons for same.

Chapter III. Duties and Responsibilities of Instructional Staff.

. . .

4. Contracts

. . .

(e) Teachers who are not to be reappointed shall be given the reasons and notified in writing by the clerk-treasurer of the school district as confirmed by the board of education on or before April 30. Such written notice to the teacher on non-re-employment shall not be necessary provided that the teacher, after having consulted with the superintendent of the schools, shall give to the board of education before April 30 a letter asking that he not be reappointed. All teachers not so notified shall be considered reappointed.

Defendants, on the other hand, assert that plaintiffs had no "property rights" in their employment upon which a due process claim could be based, and that in any event, defendants substantially complied with all statutes, rules, and regulations regarding contract termination.

II

A

The policy book was published in 1965 at the direction of the Aurora Local Board of Education. It comprises a preface, a statement of legal status, and six chapters covering 53 pages. These chapters are entitled:

I. Aurora Board of Education

II. Instructional Personnel

III. Duties and Responsibilities of Instructional Staff

IV. Pupil Personnel

V. Non-certificated Personnel

VI. Buildings and Grounds

Chapters II and III contain the provisions, supra n.2, on which plaintiffs rely in this case. These chapters were adopted by the Board on April 7, 1964, and "ordered made part of the official Board policies." The Preface, written by the superintendent, states that

> As other policies are developed, rules and regulations enacted, new positions created, or other duties assigned, they will be placed from time to time in this handbook.

The evidence does not disclose that any new matter has been placed in the handbook since its original publication, except possibly for a substitution of forms at the end of the book.

The present superintendent, Dr. H. Paul Snyder, was appointed in 1967. He was asked whether he considered the policy book to be the operating policies of the Aurora schools. He answered, "In no way. It never was at any time during my tenure." He identified at least 20 times in the policy book that have been outdated. For example, when Aurora became a city as a result of the 1970 census, the local school district became a city school district. Thereafter the county school superintendent's power over the Aurora School District ceased; and any references in the policy book to the county superintendent are superseded by operation of law.

The membership of the school board has completely changed since the policy book was published in 1965. Two present Board members have copies of the policy book. One carries the policy book to meetings. However, each stated that he does not consider the policy book as setting forth operating policies of the Board.

Notwithstanding the above facts, Chapters II and III, containing the provisions on which the plaintiffs rely, have never been formally repealed or modified by the Board since these chapters were adopted in 1964. Upon all the evidence these provisions are determined to be rules and regulations promulgated by the Board under Ohio Rev. Code § 3313.20. Further, these provisions are found to be still in effect.

The limited contracts under consideration required each plaintiff to abide by the "rules and regulations now or hereafter adopted by the said Board of Education" for the Aurora schools. Subject to the Board's rules each plaintiff implicitly became entitled to whatever rights and benefits were conferred by the Board's rules and regulations. Of course, no rule or regulation could create a right or benefit enforceable by legal action that did not conform to state law.

B

Turning now to subsection (11) of the policy book, this provision directs a principal

> to hold at least one conference and one classroom visit each year with teacher personnel, in regard to their individual growth contribution to the educational program and making such suggestions for continuous improvement as necessary and reporting such conference in writing to the conferees.

Additionally, the subsection states

> If a person's work is unsatisfactory, specific suggestions for improvement shall be made in the written report. Subsequent written reports shall confirm progress made and provide a basis for reappointment.

Further detailing the principal's duties, the subsection provides that

> The superintendent shall receive "The Teacher Evaluation Sheet" from the evaluation report for each teacher with the principal's recommendation for reappointment or dismissal by March 1 of each year.

In prescribing an annual visit to the classroom by the principal and in directing him to confer thereafter with the teacher, with written suggestions to follow for improvement, the school board apparently had in mind several purposes and goals. It sought to increase each teacher's "individual growth contribution to the educational program." Undoubtedly, the Board hoped to enhance the overall quality of teaching in the Aurora schools. Philosophical benefits to the teachers and the school system were expected to result.

The question presently posed, however, is legal not philosophical. The ultimate question is whether any of the provisions, subsections (11) or 4(e), if violated, create presently enforceable property rights. Meanwhile, the evidence will be examined to

ascertain whether, with reference to the plaintiffs, their respective principals complied with their duties as set forth in subsection (11).

The pertinent recommendation of the respective principal for the reappointment or dismissal of a particular plaintiff is the recommendation made in the 1972-73 year. Pursuant to subsection (11), this recommendation was required to be preceded in 1972-73 by a visit to the classroom. Hence, it is immaterial to consider what, if any, classroom visits occurred prior to the 1972-73 school year with reference to any of the plaintiffs.

Steven E. Ryan

Principal Lenzo of the Middle School visited the science class of plaintiff Ryan in April, 1973. Thereafter, both Mr. Lenzo and Mrs. Kutinski, head of the science department, conferred with Mr. Ryan. No written evaluation was then given to him and thus, Mr. Lenzo did not comply with this part of subsection (11). However, Mr. Lenzo employed an evaluation sheet, dated April 16, 1973, in his conferences. Moreover, it is determined that Mr. Lenzo informed Mr. Ryan, trained as a high school teacher, that he believed that Mr. Ryan set too demanding standards. Apparently he set standards that were the same for students of all grades (6, 7, and 8). Mr. Lenzo expressed the opinion that this produced unreasonable achievement expectations for sixth graders, resulted in frustrations, and caused them to elect Mrs. Kutinski's science class rather than Mr. Ryan's.

In his testimony, Mr. Ryan agreed that he had admitted to his principal that he was dissatisfied with the school and was looking elsewhere. Although Mr. Ryan was eligible for a continuing contract, Mr. Lenzo and Mrs. Kutinski recommended only a one-year limited contract. Mr. Ryan agreed with this recommendation. In view of his agreement with Mr. Lenzo's recommendation, the latter's earlier nonsubmission of a written

critique becomes immaterial. It could in no way affect the superintendent's refusal to follow Mr. Lenzo's recommendation of a one-year limited contract for Mr. Ryan.[3]

James E. Miller

At the request of James Miller, Principal Lenzo visited Mr. Miller's algebra class in November or December of 1972. Although the exact reasons are cloudy it is clear enough that Mr. Miller had been having difficulty with the girls in his class. Mr. Lenzo testified that Mr. Miller had a way of teasing the girls; that he had a sense of humor that led to using nicknames; a kind of banter that was the source of the problem. At a preadolescent age the girls rebeled or reacted to the teasing. The boys reacted better.

Mr. Lenzo did not visit with Mr. Miller's classroom at any other time during the 1972-73 school year; and he gave no written report to Mr. Miller and he made no written suggestions for improvement. Thus he did not comply with this part of subsection (11). However, the evidence indicates that Mr. Lenzo and Mr. Miller conferred at least twice during the period of March and early April, 1973. At the first of these conferences, lasting seven hours, the relation of Mr. Miller to the girls in his classes came up, including the subject of teasing. Mr. Miller admits that additional subjects were discussed. Mr. Lenzo itemized these other matters. Mr. Miller, a former coach, had requested and obtained leave to attend a football clinic; and he paid his own way. Later, a conference of math teachers

[3] Supt. Snyder did not maintain a uniorm "teacher evaluation sheet," so characterized in the second last sentence in subsection (11), and he did not insist that the principal as there indicated, should submit an "evaluation report for each teacher with the principal's recommendation for reappointment or dismissal by March 1 of each year." Instead, Supt. Snyder required each principal to present an oral evaluation of each teacher with a recommendation for reappointment or dismissal at a study session of the school board held in early April.

took place, but Mr. Miller did not attend. Mr. Lenzo expressed concern over Mr. Miller's ordering of priorities. He also went over several incidents involving other members of the staff: a shouting match with one teacher, a challenge to fisticuffs with an assistant coach responsible for directing a school bus to leave without Mr. Miller, and a discussion of teacher ethics in connection with Mr. Miller's alleged public criticism of the football coach. According to Principal Lenzo this conference picked up various matters that happened over the year. It ended with Mr. Miller taking the position that he would not change. He said, "There may be a need for change but not necessarily me."

Although Mr. Lenzo did not submit a written report of the seven-hour conference with Mr. Miller, it is concluded that the bill of particulars given to Mr. Miller by Mr. Lenzo during the seven-hour conference served the same purpose. Moreover, the absence of the written critique in no way affected or contributed to Mr. Lenzo's decision to not recommend Mr. Miller for renewal, a decision which was communicated to Mr. Miller in their second conference.

D. *Joan Felver*

Assistant Principal Dickard of the high school observed Mrs. Felver's home economics II class on January 29, 1973. His memorandum included observations (general, specific, and informal). Among specific observations, he noted, "Very good rapport between teacher and class," but added,

> Incidents relative to inappropriate comments by individuals toward one another would have been handled more firmly by the teacher had the observer not been present.

He noted that "the teacher conducted class with a confident poise," and that "even in periods of calling for restoration of order the voice was calm and firm which commanded attention." However, he offered the observation

> That at times your verbalization seems to take on a patronizing attitude; appropriate perhaps for this particular class, but could lead to difficulty with more advanced groups.

Principal O'Rourke of the high school observed Mrs. Felver's home economics II class on Friday, March 9, 1973. The latter part of his memorandum dwelt on the statistics of decreased class enrollments in this elective course, prompting him to express "concern about the vertical drop in figures." Towards the end of the paragraph he noted:

> The point here is that the Joan Felver I observed in this teaching situation was quite different from her whom I observed last April. True the courses were different, the class size was different; there was a difference, too, from the mobile, active, aware teacher I saw then. "Knowledgable" was the other adjective I used in the report of that observation; that adjective yet applies.

Nevertheless, he recommended a further one-year limited contract for Mrs. Felver, a recommendation rejected by Supt. Snyder.

Mrs. Felver testified that after the 1972-73 evaluation she received no written suggestions. She stated that on April 18, 1973, she first learned that she would not be reemployed. She asked Mr. O'Rourke for reasons and he told her that he was not allowed to give reasons.

Upon all the evidence it is concluded that with reference to Mrs. Felver there was compliance for the 1972-73 year with the requirements of subsection (11) that the principal visit the classroom, and prepare and submit to Mrs. Felver a written report of the visit. Although no conference followed the visit, Mr. O'Rourke suggested to her that they "schedule a mutually satisfactory time for a talk." But in any event since Mr. O'Rourke recommended a one-year limited contract for Mrs.

Felver, the omission of the conference preceding that recommendation is deemed of no actionable significance.

Clair R. Touby

Principal O'Rourke of the high school visited a music class of Clair R. Touby during the 1972-73 school year. Thereafter he sent Mr. Touby a letter of evaluation. Vice Principal Dickard observed a choir session taught by Mr. Touby on January 12, 1973. The written memorandum submitted to Mr. Touby, among its observations, noted:

> There never has been a question, in my opinion, that you know and command your teaching subject, and have the gift of being able to effectively teach it. In general, I believe the kids respond to your leadership and a rapport exists between teacher and class. I believe that in some cases the students do not understand your personality and, being kids, it's easier to be complaining than trying to understand.

He then observed:

> It would serve no purpose here to review your past difficulties.

But he offered the further observation that Mr. Touby became "hyper . . . prior to some big event emanating from your area of responsibility." Mr. Touby testified that during 1972-73 he received a letter from Mr. O'Rourke (presumably containing Mr. Dickard's observations). Asked if during 1972-73 he was provided written recommendations concerning improvement in his teaching, he answered, "No, sir."

Principal O'Rourke produced in court an inch thick file of correspondence that was exchanged between him and Mr. Touby during the 1972-73 school year. One packet of papers involved an exchange of communications concerning a fire inspection of

the music room. It concluded a response of Mr. Touby that ended:

> I do not know where the cabinet was located when the inspector was here so I have placed it where we kept it last year without violation. If this does not meet with his (the inspector's) approval I suspect we have a new bureaucrat throwing his weight around. I invite him to prove the allegation in court.

Mr. O'Rourke then replied to Mr. Touby on October 10, 1972. In part, he stated:

> 2. . . . you have moved the longer shelf facility from the inner hallway. This memo directs you to move the second movable shelf facility from the area between the inside entrance to the music room and the outside entrance; this location is cited to be a violation of the existing code.
> 3. It is expected that these areas will be kept clear.
> 4. Bureaucracy, allegation, court case, no matter: we shall comply.

Mr. O'Rourke further described a running dispute with Mr. Touby over the shared use of the music room. Mr. Touby took the position that the music room was to be used exclusively for music. However, lack of facilities required that the space be shared with other teachers. To this end chairs had been placed in the music room. Mr. Touby folded them. Mr. O'Rourke directed him to return the chairs to the proper places and he refused. Thereupon, Mr. O'Rourke suspended him and sent him to the superintendent's office.

Around April 12-15, 1973, Mr. O'Rourke met with Mr. Touby. At that time he advised him that his contract was not being renewed. Mr. Touby asked for reasons. Mr. Touby testified that Mr. O'Rourke answered that he felt their previous conversation and correspondence were adequate. According to Mr. O'Rourke Mr. Touby responded to Mr. O'Rourke's notification that his contract would not be renewed by asking, "Did you recommend that?" Mr. O'Rourke said that when he answered, "Yes," Mr. Touby got up and walked out of the conference.

Upon all the evidence it is concluded that with reference to Mr. Touby, Principal O'Rourke complied with all of the requirements of subsection (11).

Finding no violation of subsection (11) by Principals Lenzo and O'Rourke that are deemed material it is determined that it is unnecessary to give further consideration to plaintiffs' arguments as to the constitutional implication of any such violations.

III

A

Plaintiffs contend that they have been deprived of a constitutionally protectible expectancy of employment by the failure of the superintendent to give reasons for recommending dismissal, and by the failure of the Board of Education to give written reasons for nonrenewal of the plaintiffs' contracts. To support their claim they rely on the last sentence of sub-section (11) and subsection 4(e). The last sentence of (11) provides:

> Any teacher recommended for dismissal must have been clearly informed of his status by the superintendent and completely aware that such a recommendation is being made with definite reasons for same.

Subsection 4(e) provides:

> Teachers who are not to be reappointed shall be given the reasons and notified in writing by the clerk-treasurer of the school district as confirmed by the Board of Education on or before April 30 . . . All teachers not so notified shall be considered reappointed.

Thus, the last sentence of (11) directs the superintendent to give definite reasons for recommending dismissal. Nothing in this section mandates that the reasons must be in writing. This is not true of subsection 4(e).

Construing the first sentence of subsection 4(e) as a totality, it directs that notice of nonreappointment as well as the reasons must emanate from the Board, although it is the clerk-treasurer who transmits the notice and the reasons. Further, 4(e), reasonably read, requires that the reasons as well as the notice should be given in writing. The provision would make no sense if it required the clerk-treasurer to give written notice but permitted him to orally report the reasons. Nor is it reasonable to assume that the Board's reasons for dismissal, directed in 4(e), coincide with the reasons for a recommended dismissal that the last sentence of subsection (11) charges the superintendent to give.

Prior to his recommendation to the Board that each of the four plaintiffs should not be reemployed, Supt. Snyder met with Joan Felver and Steven Ryan and discussed his recommendation.[4] During this period he neither met with James Miller and Clair Touby, nor did he transmit to them any reasons

[4] Supt. Snyder informed Mr. Ryan that he recommended nonrenewal of his contract because Principal Lenzo and his department head Mrs. Kutinski, recommended a one-year limited contract and were unwilling to recommend a stronger contract (i.e., a continuing contract). Mrs. Felver says that in her conference with Supt. Snyder he at first said he would and could not give any reasons for not renewing her contract. When pressed, he stated that a change in the personnel would improve the home economics program. On cross-examination Mrs. Felver acknowledged that Mr. Snyder had expressed various opinions about the home economics program, including his opinion that she did as little as possible. Dr. Snyder testified that he had met with Mrs. Felver the week before the April 23 Board meeting and said he basically told Mrs. Felver the home economics program did not demonstrate the kind of progress Aurora deserved. He said that he thought Aurora would benefit by a change of personnel in the home economics department.

for not recommending renewal. Neither Mr. Ryan nor Mrs. Felver were satisfied with the reasons for dismissal given them by the superintendent. Nevertheless it is found that the superintendent gave to Mr. Ryan and Mrs. Felver what he deemed to be adequate reasons for recommending dismissal. Without dispute, he did not give reasons for dismissal to the other two plaintiffs.[5]

In submitting written notice of nonrenewal to each plaintiff by means of the clerk-treasurer's letter of April 26, 1973, the Board of Education gave no written reason to any of the four plaintiffs. Nor did the Board communicate its reasons to the plaintiffs in any other manner. The evidence, however, does reveal that when asked for reasons by Mr. Miller after the termination of the Board meeting of April 25, 1973, one of the Board members orally listed seven reasons why he voted for nonrenewal of Mr. Miller's contract.

In adopting these regulations in 1964, which called for the giving of reasons, the Board obviously sought to inform a teacher why the superintendent recommended dismissal, and

[5] In accordance with the grievance procedure of the Professional Negotiations Policies of the Aurora schools, each plaintiff filed a grievance, challenging nonrenewal of the plaintiff's contract. The action requested included a written list of reasons for nonrenewal. At the third (final) level the Board advised each plaintiff that "the nonrenewal of a limited contract is not a properly grievable matter" but in any event that "explicit information was furnished . . . by [the] building principal" and "an appropriate evaluation made." At the second level the superintendent responded in writing, being explicit in giving reasons only in his letter to Mrs. Felver. Principal Lenzo had prepared on June 13, 1973, a memorandum cataloging the deficiencies of Mr. Miller, which he said were previously recounted to Mr. Miller in the 7-hour conference in March or April. This memorandum was not transmitted to Mr. Miller. Supt. Snyder told Principal Lenzo that it was his understanding that reasons did not have to be given (for a nonrenewal) so the memorandum should be submitted to him and not to Mr. Miller. However, any reasons given in Supt. Snyder's letter to Mrs. Felver would be after April 30 and, therefore, are not deemed to satisfy subsection (11)'s direction to give "definite reasons" for nonrenewal.

why the Board determined not to renew the teacher's contract. Notwithstanding this laudable purpose, questions of enforceability arise. Could the Board take action against a superintendent who failed to comply with the last sentence of subsection (11)? Is there a state contract cause of action against the Board for breach of the Board's rules?[6] The federal question presented for decision in this action is different and precise: In this section 1983 action have the plaintiffs claimed and proved a due process deprivation of a constitutionally protectible expectancy of employment?

B

Although plaintiffs rest their "failure to state reasons" claim on both the last sentence of subsection (11) and subsection 4(e), they direct their arguments to subsection 4(e).[7] They seize on the last sentence of subsection 4(e) that states "All teachers not . . . notified [in accordance with that subsection] shall be considered reappointed." Plaintiffs insist that they should be "considered reappointed" by virtue of the Board's failure to notify them in writing of the reasons for termination "on or before April 30." Basing their alleged "expectancy of reemployment" on this automatic reappointment provision, plaintiffs maintain that the Board's nonrenewal of their contracts without giving written reasons in accordance with subsection 4(e) is a violation of due process.

If the plaintiffs had continuing contracts under Ohio Rev. Code § 3319.11, their tenure status created by this statute would constitute a protectible property interest as defined in *Board*

---

[6] See, *Dayton Classroom Teachers Assn. v. Bd. of Ed.*, 41 Ohio St. 2d 127, and *Justus v. Brown*, 42 Ohio St.2d 53 (1975).

[7] Plaintiffs apparently recognize that the school board, not the superintendent, has "the ultimate responsibility for employing teachers," *Justus v. Brown, supra* n. 6.

of Regents v. Roth, 408 U.S. 564 (1972), a case involving the dismissal of a nontenured teacher. In oft-repeated language, Mr. Justice Stewart declared:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. The Court then referred to the pertinent Wisconsin law:

> . . . the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his employment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. . . .

408 U.S. at 578. Consequently, the Court concluded,

> Thus, the terms of the respondent's appointment secured absolutely no interest in reemployment for the next year. They supported absolutely no possible claim of entitlement to reemployment. Nor, significantly, was there any state statute or university rule or policy that secured his interest in reemployment or created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578.

Under Ohio Rev. Code § 3319.11 the plaintiffs could not be "deemed reemployed" since before the 30th day of April,

the Aurora School Board gave written notice to the plaintiffs of the Board's intention not to reemploy them. However, plaintiffs apparently seek to skirt the application of *Roth* by bringing themselves within the doctrine of *de facto* tenure, or implied tenure, as developed in the companion case of *Perry v. Sindermann*, 408 U.S. 593 (1972).

In *Perry*, the plaintiff had been employed for 10 years in the Texas state college system, the last four of which as a junior college professor under a series of one-year contracts. The board of regents decided not to renew his contract for the following year, without giving him an explanation or prior hearing. Plaintiff brought suit, alleging in part that he had a property interest in continued employment and that the board's actions deprived him of his property without due process of law.

While not wholly agreeing with the opinion of the court of appeals, the Supreme Court affirmed its judgment, remanding the case to the district court. In the course of its opinion, the Court emphasized that

> . . . there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.

Finally, the Court observed

> In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the court of appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "policies and practices of the institution." . . .

Perry v. Sindermann is described in *Patrone v. Howland Local Schools Bd. of Ed.*, 472 F.2d 159, 160 (6 Cir. 1972), as

> . . . a situation where "the policies and practices of the institution" rose to the level of implied tenure.

For the same effect see *Lukag v. Acocks*, 466 F.2d 577, 578 (6th Cir. 1972).

It has been established that Ohio Rev. Code § 3319.11, which provides for tenure for teachers in Ohio's public schools does not create an expectancy of continued employment for teachers on limited contracts. *Orr v. Trinter*, 444 F.2d 128, 132-3 (6 Cir. 1971),[8] and *Patrone v. Howland Local Schools, supra.*

Attempting to take advantage of *Perry* the plaintiffs urge in substance that subsection 4(e), as one of the policies and regulations of the Aurora Board of Education, created an implied tenure or expectancy of reemployment for teachers on limited contracts over and above the rights conferred by Ohio Rev. Code § 3319.11. To support this argument plaintiffs rely heavily on *Scott v. Badger Local School District*, Case No. C 74-143Y (N.D. Ohio, 1974), in which the court reasoned,

---

[8] In *Orr v. Trinter*, which preceded *Perry*, the court of appeals said

> Whatever expectancy of employment Orr may have had [under ORC 3319.11] during his probationary period and prior to attaining tenure status was not subject to constitutional protection, but was subject to the discretion of the Board of Education not to renew his contract.

444 F.2d at 133.

> the regulations in effect and in the possession of the plaintiffs in the instant action established and created a procedure that went beyond the minimal requirements of the Ohio Revised Code. The defendants in so doing gave rise to a legitimate expectancy of reemployment until and unless the procedures outlined in the regulations handbook were met.

To the extent that there is any similarity of facts between *Badger* and the instant case, *Badger's* reasoning will not be followed in this case. A school board may not limit its exercise of its admitted statutory power under section 3319.11 not to reemploy a teacher on limited contract, by self-imposing a requirement that it give written reasons for nonrenewal in addition to the sole statutory requirement that the board give written notice of nonrenewal before April 30. To condition the Board's exercise of its power under section 3319.11 on the giving of reasons in effect would make the termination of a teacher, employed under a limited contract, subject to cause. But only teachers who have tenure are entitled to an expectancy of employment terminable only for cause. As earlier explicated the first paragraph of Ohio Rev. Code § 3319.11 fixes the tenure procedures for teachers in Ohio's public schools. Patently no board of education has the authority or power to enlarge the limits of teacher tenure beyond those limits. Indeed, the Aurora School District policy book, on which plaintiffs rely, frankly and correctly concedes,

> In developing rules and regulations, it cannot adopt standards which enlarge its authority or that of its employees beyond statutory limits.

Moreover, it is determined that subsection 4(e), viewed most favorably for the plaintiffs, does not create implied tenure. In contrast with the Faculty Guide in *Perry, supra,* which stated that the administration "wishes the faculty member to feel that he has permanent tenure . . .," the teacher contract policy of the Aurora School Board is devoid of language indicating any degree of permanency. Finally, the fact that Ohio already

has an explicit tenure policy obviates the need, which existed in *Perry,* to supply one by implication.

Thus, while subsection 4(e) provides a procedure for nonrenewal of a limited contract, the provision does not and cannot create any expectancy that such contract will, in fact, be renewed. In the absence of such expectancy, plaintiffs have no legitimate claim of entitlement to continued employment and, therefore, no property interest protectable by the Due Process Clause of the Fourteenth Amendment.[9]

Upon the findings of fact and conclusions of law heretofore made and determined, it is further concluded and determined that the plaintiffs have failed to establish a right to relief under section 1983. The separate requests of each plaintiff for reinstatement and back pay, and their joint requests for attorney fees are denied. Judgment is entered against each plaintiff and in favor of the defendants.

It Is So Ordered.

/s/ WILLIAM K. THOMAS
United States District Judge

---

[9] Plaintiffs argue that the Aurora School Board, by failing to follow its own regulations, violates the doctrines set forth by the United States Supreme Court in *Accardi v. Shaughnessy,* 347 U.S. 260 (1954), *Service v. Dulles,* 354 U.S. 363 (1957), and *Vitarelli v. Seaton,* 359 U.S. 535 (1959). Those cases establish an administrative rule which binds federal agencies to follow their own regulations even if those regulations are self-imposed. At no point in these three decisions does the Court attribute this rule of administrative law to constitutional sources. Nevertheless, because the rule is based on notions of "fundamental fairness," courts have imposed the rule on state agencies under the Fourteenth Amendment. See, e.g., *Otero v. New York City Housing Authority,* 484 F.2d 1122 (2 Cir. 1973).

However, a violation by a state agency of its own regulations is not a Fourteenth Amendment Due Process violation unless a liberty or property interest is affected by the agency's action. Thus, having determined in this case that plaintiffs do not have a property interest in continued employment, the Board's violation of its nonrenewal policy does not constitute a violation of due process under *Accardi* and *Otero.*

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [XIV]

§ 1 [1]All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall [2]make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [3]deprive any person of life, liberty, or property, without due process of law; nor [4]deny to any person within its jurisdiction the equal protection of the laws.

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who

within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two

years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the condi-

tions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.

3319.16 Termination of contract by board of education

The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause. Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its clerk of its intention to consider the termination of his contract with full specification of the grounds for such consideration. Such board shall not proceed with formal action to terminate the contract until after the tenth day after receipt of such notice by the teacher. Within ten days after receipt of such notice from the clerk of the board, the teacher may file with the clerk a written demand for a hearing before the board or before a referee, and the board shall set a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the clerk shall give the teacher at least twenty days' notice in writing of the time and place of such hearing. If a referee is demanded by either the teacher or board, the clerk shall also give twenty days' notice to the superintendent of public instruction. No hearing shall be held during the summer vacation without the teacher's consent. Such hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a referee appointed pursuant to section 3319.161 of the Revised Code, if demanded; otherwise, it shall be conducted by a majority of the members of the board and shall be confined to the grounds given for such termination. The board shall provide for a complete stenographic record of the proceedings, a copy of such record to be furnished to the teacher. The board may suspend a teacher pending final action

to terminate his contract if, in its judgment, the character of the charges warrants such action.

Both parties may be present at such hearing, be represented by counsel, require witnesses to be under oath, cross-examine witnesses, take a record of the proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the clerk of the board. In case of the failure of any person to comply with a subpoena, a common pleas judge of the county in which the person resides, upon application of any interested party, shall compel attendance of the person by attachment proceedings as for contempt. Any member of the board or the referee may administer oaths to witnesses. After a hearing by a referee, the referee shall file his report within ten days after the termination of the hearing. After consideration of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract. After a hearing by the board, the board by majority vote may enter its determination upon its minutes. Any order of termination of a conrtact shall state the grounds for termination. If the decision, after hearing, is against termination of the contract, the charges and the record of the hearing shall be physically expunged from the minutes, and if the teacher has suffered any loss of salary by reason of being suspended, he shall be paid his full salary for the period of such suspension.

Any teacher affected by an order of termination of contract may appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. Such appeal shall be an original action in said court and shall be commenced by the filing of a petition against such board, in which petition the facts shall be alleged upon which the teacher relies for a reversal or modification of such order of termination of contract. Upon service or waiver of summons in said appeal, such board shall immediately transmit to the clerk of said court for filing a transcript of

the original papers filed with the board, a certified copy of the minutes of the board into which the termination finding was entered, and a certified transcript of all evidence adduced at the hearing or hearings before such board or a certified transcript of all evidence adduced at the hearing or hearings before the referee, whereupon the cause shall be at issue without further pleading and shall be advanced and heard without delay. The court shall examine the transcript and record of the hearing and shall hold such additional hearings as it deems advisable, at which it may consider other evidence in addition to such transcript and record.

Upon final hearing, the court shall grant or deny the relief prayed for in the petition as may be proper in accordance with the evidence adduced in the hearing. Such an action is a special proceeding within the purview of section 2505.02 of the Revised Code and either the teacher or the board may appeal therefrom.

In any court action the board may utilize the services of the prosecuting attorney or city solicitor as authorized by section 3313.35 of the Revised Code, or may employ other legal counsel.

3313.20 Rules and regulations; employee attendance at professional meetings, expenses

The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. Rules and regulations regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuolsly at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. Any employee may receive compensation and expenses for days

on which he is excused in accordance with the policy statement of the board, by the superintendent of such board or by a responsible administrative official designated by the superintendent for the purpose of attending professional meetings as defined by the board policy, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred by an employee shall be paid by the board from the appropriate fund of the school district or the county board fund provided that statements of expenses are furnished in accordance with the policy statement of the board.

Each city, local, and exempted village school district shall adopt a written policy governing the attendance of employees at professional meetings.

Contie, J.

United States District Court
Northern District of Ohio
Eastern Division

Mrs. Kay Burkett,
Plaintiff,
v.
Tuslaw Local School District, et al.,
Defendants.
} Civil Action C 74-116 Y

ORDER

Plaintiff has moved this Court for a preliminary injunction to enjoin the defendants from carrying out actions which would not renew plaintiff's contract of employment for the 1974-1975 school year, pending a final hearing in this lawsuit. It is plaintiff's contention that the defendants have deprived plaintiff of a protectable property interest in her continued employment which emanates from the defendant Board's employment policy, rules and regulations without first affording plaintiff the procedural safeguards guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

Plaintiff further contends that the actions of defendants will result in irreparable injury, loss and damage to plaintiff, and further asserts that the issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants, but will prevent irreparable injury to the plaintiff.

This Court held a hearing on June 3, 1974, at which it heard testimony and took evidence relating to plaintiff's claims. Upon consideration, and for the reasons stated below, plaintiff's motion for a preliminary injunction shall be denied.

The facts as developed at the hearing of June 3, 1974 are basically uncontroverted. Plaintiff possesses a provisional certificate from the State of Ohio. She was a teacher and was employed by the defendant Tuslaw School Board for the past five years, the first three years under one year limited contracts and for the last two years under a two year contract.

It appeared from the testimony that during her performance under her two year contract, the principal of the school, one Mr. Alex Paris, learned of pupil and fellow teacher dissatisfaction with plaintiff's teaching. Pursuant to these reports, Mr. Paris attempted to evaluate plaintiff's teaching practices. He, therefore, on various occasions, during the 1972-1973 school year, observed the plaintiff in her classroom. Subsequent to the observations, Mr. Paris spoke with the plaintiff and advised her of any shortcomings which he observed.

Specific comments made by Mr. Paris related to plaintiff's preparation for class, indicating that he was of the opinion that plaintiff's classes were little more than study halls and that more instruction and lecture ought to take place during class periods. Mr. Paris further commented upon the maintenance of the equipment entrusted to plaintiff, and specifically advised plaintiff that her teaching was "not the kind of program I want in this school" and that plaintiff "would have to improve". It was the opinion of Mr. Paris that the plaintiff's performance did not improve during the first part of the second semester. The problems eventually culminated in the defendant Board of Education advising plaintiff on March 15, 1974 that she would not be given a one year limited contract for the school year of 1974-1975.

The Board's conduct is to be measured by the Tuslaw Local Board of Education's policies, which in its pertinent parts provide:

"30.342 *Procedure for non-reappointment.*

Any teacher employed under a limited contract by this Board is automatically reemployed, unless he is notified that he is not to be reemployed. Such notification on non-reemployment must be made in writing on or before April 30th or 30 days prior to the termination of the school year, whichever date is earlier . . .

2. In cases where a teacher's performance adversely affects the school program, such teacher will be notified of possible non-reappointment by the local superintendent prior to the end of the first semester of that school year so that affected party shall have the opportunity to improve his performance."

Plaintiff asserts that although she is not tenuered, that she had a protectable property interest for due process purposes, and that this interest was within the ambit of the protective guarantees of the Fifth and Fourteenth Amendments. Plaintiff asserts that the obligations created by the defendants under their Board of Education policies created a duty which they did not dispatch, and that therefore plaintiff's rights have been violated.

However, the defendants assert that the procedures established by their Board of Education policies were followed in fact, and that, therefore, plaintiff is not entitled to any relief.

This Court finds that as a matter of fact, Section 30.342 was followed by the School Board, in that the School Board notified plaintiff on March 15, 1974 that she would not be offered a one year limited contract for the school year 1974-1975. As to the policy in 30.342(2) this Court finds that although plaintiff was not specifically told that she would not be reappointed by the School Board if she did not improve, she was made aware of the fact that the Board was unhappy with her classroom conduct, and she was perfectly aware of the fact that she was told that she would have to improve. The obvious import of these

statements, combined with the fact that plaintiff was observed on four separate occasions, which is highly unusual, would be that the Board was seriously considering the propriety of her abilities as a teacher, and that evaluations were being made of her abilities.

As stated in 30.342(2), the purpose of notifying the teacher in the first semester of her possible non-reappointment is ". . . so that affected parties shall have the opportunity to improve his performance." It is the opinion of this Court, and the Court so finds, that the statements to plaintiff that she would have to improve and that her program was not the kind of program that the principal wanted in the school adequately notified the plaintiff of the possibility of her non-reappointment by the local superintendent, and the Court further finds that these notices were given to plaintiff in the first semester of the 1973-1974 school year.

Turning to the law, this Court finds that the case of *Perry v. Sinderman*, 408 U.S. 593 (1972) is distinguishable from the facts in the instant case in that the *Perry* decision by the Supreme Court was based upon preserving a protectable property interest of the plaintiff in that case. In the instant case, Section 30.342 of the Board of Education policies creates a protectable property interest, and were said section to have been breached, this Court would be of the opinion that plaintiff would have a protectable property interest under the due process clause of the Fifth and Fourteenth Amendments.

However, 30.342(2) does not turn upon the concept of automatically reemploying a teacher, but rather turns upon a notification of substandard performance and is basically provided as a notification section so that a teacher would be able to improve his or her performance before a decision under Section 30.342 was made as to non-reemployment. As the Court said in *Sindermann:*

> "We disagree with the Court of Appeals insofar as it held that the mere subjective 'expectancy' is protected by procedural due process . . ."
>
> *Perry v. Sindermann*, supra.

Further, the Sixth Circuit in the case of *Orr v. Trinter*, 444 F.2d 128 (C.A.6 1971), stated in respect to a non-tenured teacher's termination:

> "We cannot agree that the refusal to rehire plaintiff without giving reasons is itself a violation of either substantive or procedural due process. We hold that the failure to give a reason for the refusal to rehire or to grant a hearing in connection therewith, standing alone, is not constitutionally impermissible conduct on the part of the Board of Education."

This Court is of the further opinion that plaintiff has not demonstrated that she is subject to irreparable injury. The testimony brought out at the hearing indicated that plaintiff might find it difficult to secure a teaching job. However, as such, this factor alone is not irreparable injury.

Consideration of the preliminary injunction rests within the discretion of the trial court. See *Deckert v. Independence Share Corporation*, 311 U.S. 282, 61 S.Ct. 229 (1940). The burden of persuasion is placed upon a plaintiff seeking a preliminary injunction to make a clear showing that he is entitled to such action. *Garlock, Inc. v. United Seal Inc.*, 404 F.2d 256 (C.A. 6 1968).

Four basic factors which the Court takes into consideration upon considering a motion for a preliminary injunction include:

1. A threat of irreparable harm;
2. Balancing of the potential harm to the plaintiff and the harm to the defendant;

3. The probability that plaintiff would succeed upon the merits; and

4. The public interest.

Wright and Miller Federal Practice and Procedure, Civil Section No. 2948. As stated above, this Court is of the opinion that plaintiff has failed to show any irreparable injury.

This Court is also of the opinion that the likelihood of plaintiff's success on the merits is not such as would entertain the granting of a preliminary injunction.

Further, this Court is of the opinion that the public interests are best served in denying a preliminary injunction. This Court believes that plaintiff has an adequate remedy at law if she has been illegally terminated from employment with the defendant School Board. Such an action would be an action for damages for lost wages. See *Greene v. Howard University*, 412 F. 2d 1128 (C.A.D.C. 1969); *Wellner v. The Minnesota State Junior College Board*, 487 F.2d 153 (C.A.8 1973).

Therefore, and for the reasons stated above, this Court is of the opinion that plaintiff has not carried forward its burden and that the equitable considerations do not lend themselves to the issuance of a preliminary injunction. Therefore, plaintiff's motion for a preliminary injunction is hereby denied.

It Is So Ordered.

/s/ LEROY J. CONTIE, JR.
LEROY J. CONTIE, JR.
U. S. District Judge

Contie, J.

United States District Court
Northern District of Ohio
Eastern Division

Daniel Scott and Edward Anderson,	Plaintiffs,	Civil Action C 74-143 Y
v.		
Joseph Badger Local School District Board of Education, et al.,	Defendants.	

ORDER

The above entitled cause of action came for hearing before this Court July 31, 1974, on the motion of plaintiffs for preliminary and permanent injunctions. Plaintiffs seek to enjoin the defendants from not renewing the plaintiffs' contracts of employment for the 1974-1975 school year. Pursuant to Rule 65(a)(2) the parties have agreed to consolidate the hearing for the preliminary injunction with a final hearing on the merits. The following shall constitute this Court's finds of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Both plaintiffs are certified teachers and were employees of the defendant School Board of Education for the school year of 1973-1974. In September of 1968, the defendant School Board established employment policies which were formally promulgated, adopted, published and distributed to teachers, including the plaintiffs, throughout the defendants' school district. Said handbook provided that:

> "Teachers who are not to be reappointed shall have their deficiencies listed and shall be notified of same in writing

by the Superintendent of schools as confirmed by the Board on or before April 30th. All teachers not so notified shall be considered reappointed." Joseph Badger Local School District Staff Handbook—Duties, Rules and Regulations —September 1968—page 3005(2).

It is the contention of plaintiffs that defendants have failed to follow the regulations provided in said handbook and that the defendants' failure to notify the plaintiffs in writing of their deficiencies has violated plaintiffs' property rights to continued employment and constitutes a denial of the Due Process clause of the Fourteenth Amendment.

Defendants, however, asserted that the effect of the regulation in question was negated by a resolution passed by the defendant Board of Education on January 7, 1974.

The record of proceedings of the Board of Education's meeting for January 7th reflects the following notation:

> "Mrs. Zimmet moved and Mr. Jeffers seconded the motion that when contracts for certificated and classified personnel are written, terminated or not renewed, that State statutes be adhered to. All yes." Record of proceedings, Wilma B. Powell, Clerk. Defendant's Exhibit A, dated January 7, 1974.

Defendant asserts that by passing this resolution they were no longer required to provide teachers whom they decided to terminate with reasons for said termination. Specifically, defendants argue that Ohio Revised Code Section 3319.11, which provides:

> "Any teacher employed under a limited contract and not eligible to be considered for a continuing contract is at the expiration of limited contract deemed reemployed under the provisions of this section, at the same salary, plus any increment provided by the salary schedules unless the

> employing Board, acting on the Superintendent's recommendation as to whether or not the teacher should be reemployed gives such teacher written notice of its intention not to reemploy him on or before the 30th day of April . . ."

does not require that the reasons or deficiencies be listed and given to those not rehired. Defendants further argue that in light of their January 7th resolution, the regulations in the handbook were amended and that they no longer were under any duty or responsibility to indicate deficiencies to teachers.

It is the finding of this Court that the regulations established by the School Board in their handbook and distributed to each of the teachers did, in fact, establish a property interest and an expectancy of reemployment. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, and *Perry v. Sindermann*, 408 U.S. 593.

The Court finds that as a matter of law under Ohio Revised Code, Section 3511.19, there is no requirement to list deficiencies of teachers upon a decision by a School Board not to renew their contract. However, the Court finds that, as a matter of fact, the regulations in effect and in the possession of the plaintiffs in the instant action established and created a procedure that went beyond the minimal requirements of the Ohio Revised Code. The defendants in so doing gave rise to a legitimate expectancy of reemployment until and unless the procedures outlined in the regulations handbook were met. See *Greene v. Howard University*, 412 F.2d 1128 (C.A. D.C. 1969).

The basic issue before this Court rests with the effect of the January 7th resolution of the Board of Education. It is the determination of this Court that said regulation was on its face ambiguous, and while this Court does not question its legality, the Court does question the effect of said resolution. Defendants assert that plaintiffs had knowledge of the changes and the impact of the resolution of the School Board's January 7th

meeting. However, this Court finds that the facts of the instant case do not support such a conclusion. Defendants assert that one of the plaintiffs was on the Teacher Negotiating Committee and in March of 1974 attempted to negotiate a non-renewal policy calling for the giving of reasons and the allowance of a hearing. However, this Court is not inclined to conclude that this fact alone is sufficient to indicate adequate knowledge that the January 7th resolution did in fact change the policies and regulations in the defendants' handbook for the school year in question.

This Court further concludes from the facts presented at the hearing of the within cause that the evidence was insufficient to illustrate actual or constructive notice to plaintiffs or other teachers as to the existence, intent and effect of the resolution in question. Although defendants argue that it was impossible for them to notify teachers because the handbooks were in fact within the control and custody of each teacher, this Court concludes that it was incumbent upon the defendants to make adequate and proper notification and to inform each and every teacher in their system of any changes in School Board policies made in mid-year. The failure of the defendants to notify teachers of changes in regulations can therefore have no effect upon said teachers' expectancy of reemployment.

This Court finds that the cases cited by the defendants are distinguishable and not applicable to the facts of the instant case. It is the specific finding of this Court that defendants through their handbook have established guidelines that have gone beyond the minimum requirements of the Ohio statutes in question. Having done so, this Court finds that those guidelines must be adhered to. If changed, such changes and information as to the effect of such changes must be disseminated to each and every teacher in their system. Failure to disseminate such information or to adhere to the published regulations is a deprivation of a teacher's due process rights.

Having made the above mentioned findings of fact and conclusions of law, this Court determines that plaintiffs are entitled to preliminary and final injunctive relief. Therefore,

It Is Ordered that plaintiffs be reinstated to their positions as teachers with the defendant School Board. Further,

It Is Ordered that the within cause come on for hearing with regards to damages on October 9, 1974, at 9:00 a.m.

/s/ Leroy J. Contie, Jr.,
Leroy J. Contie, Jr.,
U. S. District Judge

United States District Court
Northern District of Ohio
Eastern Division

Shirley Sekeres,
Plaintiff,
v.
Stark County Board of Education, et al.,
Defendants.
No. C 75-93A

MEMORANDUM OPINION AND ORDER

Lambros, District Judge

Plaintiff in the above-styled action seeks relief from her allegedly improper termination as an instructor for the Stark County Board of Mental Retardation. The relief requested is primarily injunctive, with a request for attorneys fees and costs.

The parties have agreed to consolidate the request for a preliminary injunction with determination of final injunctive relief. Further, the parties have reached factual stipulations and submitted them along with briefs as the agreed bases for decision.

The relevant facts are these:

Plaintiff was first employed by the defendant Board as a permanent substitute (a part-time position) on March 21, 1974. On April 1, 1974, plaintiff became a full-time instructor holding the title of Instructor III B.

The Board had promulgated regulations entitled "Regulations of the Stark County Board of Mental Retardation." Plaintiff was aware of these Regulations. These guidelines delineated substantive and procedural policies concerning the operation of the educational program of the Board. Chapter IV of the Regulations was entitled Program Personnel Policies. Section

4.16(E) provided that instructors employed by the Board were to be on a probationary basis for one year. If the Board elected not to reemploy a probationary employee, written notice was to be given before the probationary period ended; if no notice was given, the employee would be deemed to be reemployed. Section 4.16(E). At no point did plaintiff ever change from probationary status.

On January 24, 1975, plaintiff was notified by a letter from the administrator of the Retarded Persons Programs that her employment would be terminated on Friday, January 31, 1975, plaintiff's performance having been deemed unsatisfactory. Her termination occurred on the date indicated, two months before the end of the probationary period.

Under Section 4.16(D) of the Regulations, there is provided a series of guidelines to be followed by the Board "in terminating an employee . . ." It is clear that these procedures were not followed. Plaintiff submits that this failure requires reinstatement.

The defendant Board contends rather that the provisions of Section 4.16(D) did not apply to plaintiff since she was a probationary employee, and the rights of probationary employees of the Board are set forth in Section 4.16(E), and Ohio Revised Code §124.27. The statutory provision allows for termination of a probationary employee without compliance with the notice and hearing requirements of O.R.C. §124.34.

The Board chose to enact Sections 4.16(D) and (E) to set forth how its employees would be treated. The Board was not obligated to provide these protections but it did. Plaintiff was aware of these provisions and was entitled to rely on them for protection. She developed a legitimate expectancy of continued employment and was entitled to have the Board follow its own regulations as to terminating her employment. *See Scott, et al. v.*

Joseph Badger Local School District Board of Education, et al., — F.Supp. — (N.D.Ohio Case No. C 74-143 Y, 1974); *also Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) and *Downs v. Conway School District*, 328 F.Supp. 338 (E.D. Ark. 1971).

The question then becomes what was the reasonable expectation of plaintiff. The Court finds that the plaintiff had no reason to expect to be afforded the protection of Section 4.16(D) of the Regulations.

In Section 4.16(B) of the Regulations the definition of removal of an employee is given. By definition, removal is the same as termination, and the fact that Section 4.16(D) refers to "termination" rather than "removal" is not significant. The definition of removal, or termination, is as follows:

> *Removal* constitutes a permanent separation from the service. An employee who has been removed will usually not be considered eligible for further county employment or for competition in a Civil Service examination. *Nothing in this memo applies to a probationary removal made during the first portion of an employee's appointment.* (Emphasis added.)

Concededly the language of Section 4.16 is somewhat confusing. But nonetheless a fair reading, indeed the only fair reading, is that this proviso means that a probationary employee may be terminated by the Board without compliance with Section 4.16(D). This being so, plaintiff has no expectation of continued employment based on that section.

Such an interpretation is compatible with Section 4.16(E), which concerns itself with reemployment, not termination. Plaintiff has raised only this as the ground for relief, but the Court feels one more issue needs determination. While the Board could grant more protection to its employees than do the Ohio

laws, it would need to comply with the minimum statutory requirements. Under O.R.C. §124.47, however, probationary employees may be discharged upon completion of one-half of the probationary period, if given notice of the reasons for termination. Plaintiff was given notice in the letter of January 24, 1975 of her termination, and the reasons therefore. The Board thus complied with the statute and plaintiff may obtain no relief on that basis.

For the reasons stated, plaintiff's request for relief is denied and this case is dismissed.

It Is So Ordered.

/s/ THOMAS D. LAMBROS
United States District Judge

Dated: 5/21/75

Supreme Court of the United States

October Term, 1976
No. 76-610

STEVEN RYAN, *et al.*,
Petitioners,

vs.

AURORA CITY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN F. LEWIS
JAMES H. WOODRING
JOHN T. MEREDITH
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200
Attorneys for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes and Rule

Supreme Court of the United States

October Term, 1976
No. 76-610

STEVEN RYAN, *et al.*,
Petitioners,

vs.

AURORA CITY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet officially reported, is fully presented in the Petition for Certiorari at pp. A-1 - A-14. The unreported opinion of the United States District Court for the Northern District of Ohio is set forth in the Petition for Certiorari at pp. A-15 - A-37.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional provisions and statutes cited by Petitioners, this case involves Sections 3319.07 and 3319.08 of the Ohio Revised Code, both of which are fully set forth in the Appendix to this Brief.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals for the Sixth Circuit correctly held that a nontenured Ohio public school teacher cannot acquire a constitutionally protected expectancy of reappointment by virtue of a board of education policy, when the subject policy is inconsistent with the State of Ohio's explicit, comprehensive, and exclusive statutory tenure system, and when the policy would not create an enforceable state law right to reappointment.

COUNTERSTATEMENT OF THE CASE

Each of the four Petitioners was a nontenured public school teacher who was employed by the Respondent Aurora Board of Education (hereinafter "Board") on a "limited contract." These contracts specifically provided that they would terminate at the end of the 1972-73 school year unless renewed by the Board.

In April, 1973, the Board sent Petitioners written notice that their contracts would not be renewed for the following school year. Accordingly, Petitioners' employment terminated with the expiration of their 1972-73 contracts. Thereupon, they filed this lawsuit, asserting that they had been denied due process of law because the Board

had not provided them with written reasons for nonrenewal of their contracts.

Petitioners do not claim that the Board had a statutory obligation to give them reasons, nor, at this stage of the case, do they deny that the Board had the power to terminate them without cause. Ohio law specifically gives boards of education the authority to employ teachers, and it provides for two types of employment contracts—"limited" and "continuing" (R.C. §3319.07 and §3319.08). As fully set forth in the Petition for Certiorari, teachers with continuing contracts are in effect tenured: their employment may be terminated only for cause, and the termination is subject to compliance with statutory hearing procedures (R.C. §3319.16). Termination of a limited contract during its term likewise is subject to cause and statutory hearing procedures. However, teachers on limited contracts are in effect nontenured. So long as a board of education gives them notice before April 30 of its intent not to renew their contracts, they can be terminated at the end of the contract without regard to cause and without being given reasons or any explanation. Moreover, a board of education's decision not to renew a limited teaching contract is final and nonappealable.

Notwithstanding this clear, exclusive statutory tenure scheme, Petitioners claim that they had a constitutionally protected expectancy of reemployment because of the following Board policy:

> "(e) Teachers who are not to be reappointed shall be given the reasons and notified in writing by the clerk-treasurer of the school district as confirmed by the board of education on or before April 30. Such written notice to the teacher on non-re-employment shall not be necessary provided that the teacher, after having consulted with the superintendent of the

schools, shall give to the board of education before April 30 a letter asking that he not be reappointed. All teachers not so notified shall be considered reappointed."

This policy was adopted by the Board in 1964 and published as part of a Policy Handbook in 1965. Although the Petition for Certiorari asserts that the policy was "made available" to Petitioners by the Board, in fact it was last distributed to teachers in the 1966-67 school year and was collected from them at the end of that year. In the 1972-73 school year, teachers were given only a collective bargaining agreement between the Board and the Aurora Education Association and another booklet ("The Teachers Handbook"), neither of which contained the subject policy. Moreover, as the trial court noted, the 1965 Policy Handbook contained many policies which were no longer in effect in 1973. Nevertheless, the trial court found that the subject policy had never been formally repealed and was still in effect. Further, although Respondents vigorously disputed these points, the trial court held that the policy required both written reasons and written notice, and that the Board had not substantially complied with the written reasons requirement (Petition at pp. A-20, A-21 and A-30).

However, the trial court correctly concluded that the policy was invalid as inconsistent with state law to the extent that it conditioned the Board's authority not to renew a limited contract on the giving of written reasons. The trial court also noted that the 1965 Policy Handbook did not purport to confer any degree of permanence on nontenured teachers, and it concluded that the statutory tenure system obviated the need to supply a tenure system by implication from Board policies. Accordingly, the trial court concluded that the Petitioners did not have a property interest in reappointment, and the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. Introduction

Petitioners advance three reasons for this Court to review the decision below: (1) inconsistency with decisions of this Court; (2) inconsistency with decisions of other U. S. Courts of Appeal; and (3) inconsistency with decisions of the Supreme Court of Ohio. All three of Petitioners' arguments assume that the courts below incorrectly determined the underlying state law issue, and no substantial federal question can be reached in this case unless this Court first reviews the state law question. Each of Petitioners' arguments will now be addressed in turn.

II. The Court Below Explicitly Followed and Correctly Applied the Controlling Decisions of This Court

The Court below explicitly followed and correctly applied this Court's decisions in *Bishop v. Wood*, 425 U.S. ....., 97 S. Ct. ....., 48 L. Ed. 2d 684 (June 10, 1976); *Paul, Chief of Police of Louisville v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

Indeed, this Court's recent decision in *Bishop*, which the Petition fails to mention, is directly on point. The plaintiff in *Bishop*, a police officer who was discharged without a hearing, asserted a property interest in continued employment based on the language of a local ordinance. The court began by stating the general principle that property interests are created by state law:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract.

> In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." 48 L. Ed. 2d at 690.

The court then found that the ordinance did not provide for judicial review of the grounds for discharge, and held that plaintiff had no property interest in his job.

> "In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case.
>
> * * * * *
>
> "Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment." 48 L. Ed. 2d at 691.

In this case, the appellate court, relying specifically on *Bishop*, *Paul* and *Perry*, held that Petitioners' alleged interest in reappointment must be established by state law (Petition at pp. A-7, A-10, A-11). As in *Bishop*, both the appellate court and the trial court held (as Petitioners now concede) that the subject Board policy did not make nonrenewal of Petitioners' contracts subject to cause or judicial review[1] under state law. As in *Bishop*, both courts further found compliance with the procedural aspects of the policy to the extent that those procedures were consistent with and enforceable under state law. Finally, following this Court's analysis in *Bishop* to the letter, the appellate court concluded that the decision not to renew Petitioners' contracts did not deprive them of a property

1. *DeLong v. Board of Education of Southwest School District*, 36 Ohio St. 2d 62, 303 N.E.2d 890 (1973).

interest protected by the Fourteenth Amendment (Petition at pp. A-2, A-3, A-11, A-13, A-14, A-29, A-36, A-37).

Notwithstanding the clear parallel between *Bishop* and the instant case, the Petition for Certiorari attempts to create a conflict between one sentence in the decision below and language in this Court's decision in *Perry v. Sindermann, supra.* To this end, Section I of the Petition misstates the Sixth Circuit's holding on the state law issues (see Section IV, *infra*) and then asserts that the decision is based on the proposition that any kind of statutory tenure system necessarily eliminates the possibility of basing a Constitutionally protected expectancy of employment on the policies of an educational institution.

This was not the holding of the court. The Sixth Circuit's opinion does include the phrase, quoted by Petitioners, that "a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system." However, this phrase appears in the middle of a passage which reaffirms the court's reliance on *Perry*:

> "A non-tenured teacher may acquire an 'expectancy' of continued employment where the policies and practices of the institution rise to the level of implied tenure. *See, Sindermann,* 408 U.S. at 603; *Patrone v. Howland Board of Education,* 472 F.2d 159, 160 (6th Cir. 1972); *Lukac v. Acocks,* 466 F.2d 577, 578 (6th Cir. 1972). We hold, however, that a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system. *See Patrone,* 472 F.2d at 160-61; *Lukac,* 466 F.2d at 578; *Orr,* 444 F.2d 132-33. *See also Blair v. Board of Regents,* 496 F.2d 322 (6th Cir. 1974). Since property interests are cre-

ated by state law and not the Constitution, *Roth* at 577, the fact that *the State limits* the guarantee to only tenured teachers, necessarily negatives any property interest.

"This conclusion is supported by the Supreme Court's decision in *Sindermann.*" (Petition at p. A-10, emphasis supplied.)

The manner in which the State of Ohio limits the reemployment rights of teachers in its exclusive statutory tenure system is spelled out in detail earlier in the Sixth Circuit's opinion: "The statute delineates *only three situations recognized by Ohio law* in which a teacher whose limited contract is about to expire can acquire a right to reemployment without action by the Board to offer continued emloyment." (Petition at p. A-4, emphasis supplied).

Thus, the court below held that the policies of an institution do not create an expectancy of reappointment when, as here, such an expectancy would be unenforceable as inconsistent with the provisions of a statutory tenure system which specifically and exclusively limits reemployment rights. Clearly, this ruling is consistent with *Perry*, where this Court said:

"If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." 408 U.S. at 602 n.7.

Likewise, the decision of the trial court, which is based on both the existence of a statutory tenure system and the nature of the subject Board policy, clearly follows *Perry*. The trial court said:

"As earlier explicated the first paragraph of Ohio Rev. Code §3319.11 fixes the tenure procedures for teachers

in Ohio's public schools. Patently no board of education has the authority or power to enlarge the limits of teacher tenure beyond those limits. Indeed, the Aurora School District policy book, on which plaintiffs rely, frankly and correctly concedes,

'In developing rules and regulations, it cannot adopt standards which enlarge its authority or that of its employees beyond statutory limits.'

"Moreover, it is determined that subsection 4(e), viewed most favorably for the plaintiffs, does not create implied tenure. In contrast with the Faculty Guide in *Perry, supra,* which stated that the administration 'wishes the faculty member to feel that the he has permanent tenure . . .,' the teacher contract policy of the Aurora School Board is devoid of language indicating any degree of permanency. Finally, the fact that Ohio already has an explicit tenure policy obviates the need, which existed in *Perry,* to supply one by implication.

"Thus, while subsection 4(e) provides a procedure for non-renewal of a limited contract, the provision does not and cannot create any expectancy that such contract will, in fact, be renewed. In the absence of such expectancy, plaintiffs have no legitimate claim of entitlement to continued employment and, therefore, no property interest protectable by the Due Process Clause of the Fourteenth Amendment." (Petition at pp. A-36, A-37.)

Manifestly, the decisions of the Sixth Circuit and the trial court in this case are consistent with and required by the rulings of this Court in *Perry, Paul* and *Bishop.*

III. The Decision Below Does Not Conflict With Decisions of Other United States Courts of Appeals

No doubt aware that the "conventional wisdom" is that petitions for certiorari are most often granted when a conflict exists among the Courts of Appeals, Petitioners attempt to create conflicts between this case and a potpourri of other decisions, all of which are distinguishable as to facts and legal theory.

There are two edges to Petitioners' "conflict of circuits" sword. First, at the end of Section I of the Petition for Certiorari, Petitioners allude without explanation to a supposed conflict between the decision below and the manner in which *Perry v. Sindermann, supra,* was applied in *Soni v. Board of Trustees of the University of Tennessee,* 513 F.2d 347 (6th Cir. 1975); *Cardinale v. Washington Technical Institute,* 500 F.2d 791 (D.C. Cir. 1974); and *Johnson v. Fraley,* 470 F.2d 179 (4th Cir. 1972).

All three of these decisions are perfectly consistent with the decisions below in this case. Both *Johnson* and *Cardinale* were in the context of motions to dismiss filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The plaintiffs' allegations as to the validity of the school policies at issue, and as to their detrimental reliance on them, were taken as true. Indeed, the *Johnson* court specifically declined to decide whether the policies cited by plaintiff were consistent with state law; it did note the relevance of the issue, but left its determination for the trial court on remand. 470 F.2d at 182.

Likewise, there is no inconsistency between the Sixth Circuit's decision in this case and its prior decision in *Soni. Soni* was a classic promissory estoppel/implied contract case, with overtones of national origin discrimination.

Although the plaintiff had not been granted tenure, he had been repeatedly assured that he would have been given tenure but for a statute prohibiting tenure for aliens. Further, he had been treated as if he had tenure for several years prior to his dismissal, and he had relied to his substantial detriment on the representations and conduct of school officials. In contrast, in the instant case, the constitutionality of the applicable state statute is not in question. Moreover, the trial court made no finding of reasonable detrimental reliance on the subject Board policy. The trial court specifically stated: "Moreover, their limited contracts having expired, each plaintiff testified that the Board had the right to make the decision on reemployment." Significantly, the Sixth Circuit did not overrule *Soni* in the decision below. Rather it correctly noted that "*Soni* has no application to the present case." (Petition at p. A-11).

In a second, unrelated attempt to create a conflict of circuits, Petitioners try to develop a substantive due process claim in Section II of the Petition for Certiorari. At the outset of this argument, Petitioners misstate Respondents' position (Petition at p. 9). It is *not* undisputed that the Board committed itself to provide written reasons to teachers after announcing its final, nonappealable decision not to renew their contracts. Respondents vigorously disputed this construction of the policy in both the District Court and the Court of Appeals. Further, Respondents asserted that they had substantially complied with any written reasons requirement, and, alternatively, that a regulation conditioning contract nonrenewal on giving reasons would be unenforceable as beyond the authority of the Board of Education to enact.

The courts below did not accept Respondents' first two arguments but approved the third—i.e., they found

that the Board lacked power to condition its statutory power not to renew a teacher's contract on the giving of reasons. Accordingly, the courts further concluded that such an invalid policy could neither form the basis of a property interest nor be enforced on a substantive due process theory.

This conclusion is not inconsistent with any decision of another Court of Appeals. None of the decisions cited by Petitioners considers the enforceability of an *invalid* government regulation or policy. Moreover, to the limited extent that Petitioners' decisions concern the enforceability of government regulations on any theory of law, they involve enforcement of regulations designed to confer a substantial procedural benefit on the employee—normally a procedural benefit which affects the employee's ability to contest a decision affecting a substantive right. Compare *Vitarelli v. Seaton*, 359 U.S. 535 (1959), a federal administrative law decision on which Petitioners rely, with *American Farm Lines Inc. v. Black Ball Freight Service*, 397 U.S. 532 (1970). In contrast, the policy at issue here at most provides for giving an employee the reasons for a non-appealable decision after the decision has become final. The policy does not permit the employee to contest the decision, and, as the trial court noted, the decision is not one which affects a right to life, liberty or property (Petition at p. A-37).

Within this general framework, the remaining decisions cited by Petitioners are readily distinguishable from the decisions below, as follows:

(1) In *Prince v. Bridges*, 537 F.2d 1269 (4th Cir. 1976), the court dismissed the plaintiff's due process claim. While dicta quoted by Petitioners suggests that agency regulations may be enforceable on a due process theory, the court had no occasion to consider the enforceability of an

invalid regulation in any context, much less the question of whether such a regulation would support a due process claim in the absence of a trial court finding of detrimental reliance on it.

(2) *Green v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969), was not a Fourteenth Amendment case. Rather, it was decided that the plaintiffs had an implied contract/promissory estoppel claim against the defendant, a private university.

(3) The plaintiff in *Sigmon v. Poe*, 528 F.2d 311 (4th Cir. 1975) asserted a right to reinstatement under a state statute which prohibited dismissal of probationary employees for "arbitrary, capricious, discriminatory or for personal or political reasons." Although the plaintiff had argued that defendant's procedural policies were also of consequence, the Fourth Circuit affirmed the trial court's decision denying preliminary injunctive relief without reference to these local practices. The decision was based solely on plaintiff's failure to establish violations of the substantive right conferred by state law.

(4) *Thomas v. Ward*, 529 F.2d 916 (5th Cir. 1975), has nothing whatever to do with a general obligation to comply with procedural regulations. Rather the court found that the plaintiff had a property interest in continued employment because, like the plaintiff in *Perry v. Sindermann, supra*, he had relied on a school handbook which explicitly conferred a right to dismissal only for cause.

(5) In *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976), the court cited *Vitarelli v. Seaton, supra*, and a controlling state court decision for the proposition that state agencies must follow their own regulations. It then found no violation of applicable regulations, and remanded the

case for consideration of First Amendment issues. The court did not consider the enforceability of invalid regulations nor of regulations which are unrelated to protection of a substantive right.

(6) *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126 (8th Cir. 1975), noted in dicta that, as a matter of *state law*, the defendant would have had to follow its own regulations *if* it had enacted any. The holding of the case was that the plaintiff, a nontenured public school teacher, had no property interest in reemployment. Dismissing plaintiff's claim, the court said:

> "Under Iowa law, a non-tenured teacher is hired on a year to year basis. Unless affirmative action is taken to terminate employment, however, teaching contracts are automatically renewed each year. We have recently held that this procedure creates no expectation of continued reemployment and thus, no property interest requiring constitutional protection." 519 F.2d at 127.

None of these decisions is inconsistent with the decisions of the court below. Most of them involve issues unrelated to those presented by the instant case. One of them, *Brouillette*, directly supports the decision of the court below, and others provide indirect support for it. Quite simply, Petitioners' conflict of circuits argument is a sham constructed from excerpts taken out of context from dicta in various inapposite opinions. It provides no basis for granting certiorari in this case.

IV. The Courts Below Correctly Applied Applicable Principles of State Law

The decision below interprets state law in a manner consistent with decisions of the Supreme Court of Ohio, Ohio trial courts, and its own prior decision in *Orr v. Trinter*, 444 F.2d 132 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

This Court has consistently refrained from reversing a Federal trial court's interpretation of state law, unless that construction is untenable. *Bishop v. Wood, supra*, 48 L. Ed. 2d at 684, n.10. Petitioners' argument falls far short of this standard.

At the outset, it is important to understand exactly what the court below held. It did *not* hold, as Petitioners suggest, that "it was beyond the statutory power of the Board to agree to provide Petitioners with reasons for nonrenewal of their contracts." (Petition at p. 6). Rather, the court held that it was beyond the statutory power of the Board to make renewal of limited contracts subject to cause or to obligate itself to reappoint a nontenured teacher who was not given reasons for a decision not to renew his limited contract. Such a policy would be inconsistent with R.C. §3319.11, which contemplates that a board of education's decision not to renew a limited contract becomes effective upon receipt by the teacher of written notice of nonrenewal, whether or not the notice is accompanied by a written statement of reasons.

This holding is not inconsistent with the authority of a board of education to enact reasonable rules and regulations pursuant to R.C. §3319.20. This power is limited by the principle that such rules cannot be inconsistent with statute *or purport to abrogate a duty imposed on the Board by statute.* As the Supreme Court of Ohio stated in the

syllabus[2] of *Dayton Teachers Association v. Dayton Board of Education*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975):

> "A board of education is vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees, *so long as* such agreement *does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by law.*" 41 Ohio St.2d at 127 (Syllabus No. 1) (Emphasis supplied.)

It is well established that R.C. §3319.08 and R.C. §3319.11 define the contract rights of Ohio teachers, and impose the power and duty of reemploying teachers solely in board of education. *Justus v. Brown*, 42 Ohio St.2d 53, (1975); *DeLong v. Board of Education of Southwest Local School District, supra.* Moreover, the duty of a board of education to prevent an unqualified teacher from attaining tenure status is as much a part of the statutory tenure system as the rights and benefits conferred on tenured teachers. As the Sixth Circuit said in *Orr*:

> "[W]e emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be

2. Ohio follows the "syllabus rule", by which the syllabus of a Supreme Court decision, not the language of the opinion, contains the controlling principles of law. *Beck v. Ohio*, 379 U.S. 89, 93 (1964); *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

> renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education, 444 F.2d at 135."

Although the Supreme Court of Ohio has not considered facts identical to those of the case at bar, an Ohio trial court recently did in *Monica Zifco, et al., Plaintiffs v. Grand Valley Local District Board of Education, et al., Defendants*, Ashtabula County Court of Common Pleas, Case No. 64953 (Judge Pontius, September 27, 1976) (See Appendix to this Brief, p. 21). In that case, the seven plaintiffs asserted a right to renewal of their limited teaching contracts because of the defendants' "Fair Dismissal Policy." The court dismissed plaintiffs' claim. It held:

> "The policy statement shortens the time of notice to April 10 and imposes many other restrictions on the power of the Board not to renew a limited contract. A recital of such restrictions upon the Board's power is not necessary to set forth in this Memorandum Opinion.
>
> "This issue has been before the courts on several occasions. *The cases hold that where the Statutes provide a procedure for dismissal of a tenured teacher or for non-renewal of a teacher's limited contract, the statutory procedure alone prevails; and Boards of Education may not by agreement or otherwise impose upon their own statutory authority greater restrictions or additional conditions beyond those imposed by the Statute.*"

To counter these cases, Petitioners cite cases standing for the general proposition that a board of education has the power to enact reasonable rules and regulations. *State ex rel. Ohio School Athletic Association v. Judges of*

the Court of Common Pleas of Stark County, 173 Ohio St. 239, 181 N.E.2d 281 (1962); *Wheeler v. Board of Education of Cleveland Heights*, 30 Ohio St. App.2d 136, 283 N.E.2d 652 (1972). They cite one case which holds that a valid school regulation may become part of a teacher's contract with a private university, *Rehor v. Case Western Reserve University*, 43 Ohio St. 2d 224, 331 N.E.2d 416 (1975). Finally, they cite three federal trial court decisions by two judges. The quoted language from *Burkett v. Tuslaw Local School District*, C74-116 Y (N.D. Ohio 1974), is dicta. *Scott v. Joseph Badger Local School District Board of Education*, C74-143 Y (N.D. Ohio 1974) was adequately discussed by the courts below. The third decision, *Sekeres v. Stark County Board of Education*, C75-93 A (N.D. Ohio 1975), specifically acknowledged that a board of education could not depart from statutory requirements. (*Burkett, Badger* and *Sekeres* appear in the Petition at pp. A-45, A-51 and A-56, respectively).

These cases do not establish that the trial court's decision in this case is based on a clearly unreasonable construction of state law. To the contrary, the decisions in *Dayton Teachers Association, Justus, DeLong* and *Zifco* unequivocally support the interpretation of state law adopted by the court below. Accordingly, Petitioners' third argument for granting certiorari should be rejected.

CONCLUSION

For reasons set forth herein, Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

JOHN F. LEWIS
JAMES H. WOODRING
JOHN T. MEREDITH
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200
Attorneys for Respondents

APPENDIX

OPINION OF THE COURT OF COMMON PLEAS OF ASHTABULA COUNTY, OHIO IN ZIFKO, ET AL. V. GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.

Case No. 64953

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO)
) SS:
ASHTABULA COUNTY)

MONICA ZIFKO, *et al.*,
Plaintiffs,

vs.

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
Defendants.

OPINION

R. PONTIUS, J.:

The seven plaintiffs herein are former teachers in the Grand Valley School District. Each held a limited one-year contract for the school year 1975-1976. No one of plaintiffs was tenured. Plaintiffs seek a mandatory injunction restoring to each of them a teaching position for the 1976-1977 school year and both compensatory and punitive damages. The claim of plaintiffs is based on an alleged denial of a constitutional right to contracted pro-

cedural due process of law in violation of the 14th Amendment to the Federal Constitution.

The basis of plaintiffs' claim lies in a so-called "Fair Dismissal Policy" contained in a "Policy Book" which is Plaintiff's Exhibit 2 and which plaintiffs claim was duly adopted by resolution of the Board of Education in February 1971 after negotiations with the Teachers Association or union. The present members of the Board of Education, and defendants herein were not then members of the Board of Education. This Court does not consider that fact to be at all significant.

At the hearing on August 11 it was stated by counsel on both sides that a search of the Board of Education minutes failed to reveal the formal adoption of the policy statement by resolution; and the right was reserved to submit evidence of that fact upon the return of the Clerk of the Board, who was then absent from the area on vacation, at which time the Board minutes would then be available. However, for reasons hereinafter stated, the Court is of the opinion that the issues raised can well be decided without resort to a determination whether or not the so-called policy was adopted by resolution of the Board which is actually reflected in its minutes.

There was oral testimony to the effect that the policy statement was in fact adopted by resolution of the Board some time during the year 1971 and that on two occasions thereafter, prior to the occurrence of the facts which are the basis for this lawsuit, the Board had in fact acted under the provisions of the policy statement with respect to notice, hearing, etc. regarding the non-renewal of limited contracts of two teachers.

The testimony also showed that it was a practice of the Board to deliver copies of the policy statement to new

teachers at the time of the execution of their contract or immediately thereafter, and such was done with the plaintiffs in this case. The Court therefore will treat the policy statement as having actually been adopted by the previous Board of Education and there is no evidence to indicate that the present Board ever took any action to rescind it. In fact, they reaffirmed it. Thus, the policy statement became a part of each teacher's contract.

The real issues in this case are three in number:

1. Whether plaintiffs have performed all that is required of them in order to be entitled to a judicial remedy, whether in equity or in law, for a claimed breach by the Board.

2. Whether the provisions of the policy statement are valid under State law.

3. Whether or not the Board has breached the contract.

As to question number 1, let it be well understood by all concerned that there is no evidence whatsoever of what is known in contract law as an anticipatory breach by the Board with respect to the requirements of the policy statement in regard to the Fair Dismissal Policy. If there were a claimed anticipatory breach it might excuse performance by plaintiffs. There is none, however, and therefore regardless of the other issues involved, in order for plaintiffs to prevail, they must have performed or offered to perform their obligation under the contract before they can claim relief for an alleged breach of the contract by the Board of Education. This point was not argued orally by counsel, nor was it contained in any memorandum submitted to the Court.

R.C. 3319.11 provides in substance that a teacher under a limited contract (as were the plaintiffs here) is deemed

to be re-employed unless the Board gives written notice of its intention not to renew the contract on or before April 30, and that failure to notify constitutes renewal of the contract. Paragraph 6 of the policy statement provides that such notice be given on or before April 10. The terms of the Statute prevail over the terms or provisions of the contract that are in conflict with Statutes on the same point. This is a fundamental legal principle and requires no citation of authorities to confirm it.

Plaintiffs do not claim that their "property right" to a contract of employment has been denied them by a denial on the part of the Board of their right to procedural due process under the Statute, but rather through a denial of procedural due process created by contract. Assuming there is such a theory in the law, nonetheless two basic principles stand out boldly.

1. The provisions of the Statute are a part of the contract, and prevail over provisions of the contract in conflict with it.

2. Plaintiffs must have performed or offered to perform their part of the contract in the absence of an anticipatory breach by the defendants (and none is claimed or shown with respect to the matters of statement of charges, hearing, and opportunity to present evidence, etc.).

Plaintiffs' answers to interrogatories show that notice by the Board of Education of its intent not to renew the contract of each plaintiff was received April 29. This date is outside of the time limit set forth in paragraph 6 of the Fair Dismissal Provisions of the policy statement, but is within the time limit of the Statute. The interrogatories of plaintiffs also show that no demand for a hearing as provided for in the policy statement (six days after notice) was made by plaintiffs until July 7. Thus plaintiffs did not perform the so-called contract on their part. The

Equity Maxim of "He who seeks Equity must do Equity" would bar the claim to the equitable remedy of injunctive relief. See 29 OJ 2d, 144—Equity.

As to question number 2, are the provisions of the policy statement in question here valid and enforceable under the law? This Court holds that they are not.

At the outset it would be well to keep in mind that Boards of Education are creatures of the legislature and have only such powers and authority and duties as are expressly delegated or imposed upon them by Statute and such additional implied powers as may be necessary to carry into effect the express powers and duties imposed upon them by the Statute.

The State has provided a tenure law for teachers and has provided for and defined limited and continuing contracts. The State has also prescribed procedures for terminating each class of teachers' contracts thus defined.

The provisions of the policy statement with respect to the manner in which a teacher holding only a limited contract may be "dismissed" in the sense of his contract not being renewed for another school year are somewhat similar to the procedures the Board must take to dismiss a teacher holding (or entitled to hold) a continuing contract. The Statute (R.C. 3919.11) requires only written notice by April 30 by the Board of Education to the teacher of intent not to renew a limited contract. The policy statement shortens the time of notice to April 10 and imposes many other restrictions on the power of the Board not to renew a limited contract. A recital of such restrictions upon the Board's power is not necessary to set forth in this Memorandum Opinion.

This issue has been before the courts on several occasions. The cases hold that where the Statutes provide a

procedure for dismissal of a tenured teacher or for non-renewal of a teacher's limited contract, the statutory procedure alone prevails; and Boards of Education may not by agreement or otherwise impose upon their own statutory authority greater restrictions or additional conditions beyond those imposed by the Statute. See the following cases, all cited in the brief of defendant Board of Education. Ryan vs Aurora City Board of Education, U.S. Court of Appeals, 6th Circuit, decided August 2, 1976; DeLong vs Board of Education, Southwest School District, 37 OA 2d, 69; also see Patrone vs Board of Education, 67 OO 2d, 371; State, ex rel Bishop-vs-Board of Education, 139 OS 427 (syl. 7).

The case of Scott and Anderson vs Joseph Badger Local School District, Board of Education, U.S. District Court, Northern District of Ohio, decided July 31, 1974, Opinion by Conti, Judge, referred to in, and copy attached to plaintiffs' Trial Memorandum is, in the opinion of this Court, completely overridden by the decision in Ryan, supra, although not mentioned in the Opinion.

Question 3 stated at the outset of this memorandum is answered by foregoing principles.

For the reasons set forth above, this Court holds that plaintiffs are not entitled to the injunctive relief prayed for on either a temporary or permanent basis, and same will be denied.

The case presently will be retained for later determination on the questions at law pertaining to the right of plaintiffs to recover damages as pleaded. Counsel for defendant will prepare and submit a judgment entry in keeping with this Opinion.

IT IS SO ORDERED this 27th day of September, 1976.

ROLAND PONTIUS
Judge

OHIO REVISED CODE

3319.07 Employment of teachers.

The board of education of each city, exempted village, and local school district shall employ the teachers of the public schools of their respective districts. In making appointments teachers in the employ of the board shall be considered before new teachers are chosen in their stead. In city and exempted village districts no teacher or principal shall be employed unless such person is nominated by the superintendent of schools of such district. Such board of education, by a three-fourths vote of its full membership may re-employ any teacher whom the superintendent refuses to appoint. In local school districts, no teacher or principal shall be employed unless nominated by the superintendent of schools of the county school district of which such local school district is a part; by a majority vote of the full membership of such board, the board of education of any local school district may, after considering two nominations for any position made by the county superintendent, re-employ a person not so nominated for such position.

3319.08 Teacher employment and re-employment contracts.

The board of education of each city, exempted village, local and joint vocational school district shall enter into written contracts for the employment and re-employment of all teachers. The board of education of each city, exempted village, local, and joint vocational school district, which authorizes compensation in addition to the base salary stated in the teachers' salary schedule, for the performance of duties by a teacher which are in addition to

the teacher's regular teaching duties, shall enter into a supplemental written contract with each teacher who is to perform additional duties. Such supplemental written contracts shall be limited contracts. Such written contracts and supplemental written contracts shall set forth the teacher's duties and shall specify the salaries and compensation to be paid for regular teaching duties and additional teaching duties, respectively, either or both of which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not void such employment contract.

Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract for a superintendent is a contract for such term as authorized by section 3319.01 of the Revised Code, and for all other teachers for a term not to exceed five years. A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates. This section applies only to contracts entered into after August 18, 1969.

Supreme Court of the United States

October Term, 1976
No. 76-610

STEVEN RYAN, *et al.*,
Petitioners,

vs.

AURORA CITY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

JOHN F. LEWIS
JAMES H. WOODRING
JOHN T. MEREDITH
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200
Attorneys for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

Supreme Court of the United States

October Term, 1976
No. 76-610

STEVEN RYAN, *et al.*,
Petitioners,

vs.

AURORA CITY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

In support of their Petition for Certiorari, Petitioners assert that the Court below decided an important question of state law in a way inconsistent with decisions of Ohio state courts. Further, other grounds advanced by Petitioners in support of certiorari presuppose that their state law theory is correct. Respondents vigorously disputed Petitioners' interpretation of state law in Respondents' Brief in Opposition to Certiorari, filed on December 2, 1976. (See Respondents' Brief at pp. 15-18.)

Since Respondents' Brief was filed, yet another Ohio state court has decided the state law question at issue here in the same manner as the Court below. The case is

Chris Depas, Plaintiff-Appellant v. Highland Local School District Board of Education, Defendant-Appellee, Court of Appeals for the Ninth Judicial District, C.A. No. 657 (December 15, 1976), reprinted in the appendix to this Supplemental Brief.

The plaintiff in *Depas,* like Petitioners herein, was employed by a board of education on a "limited contract". As in this case, the plaintiff's contract had been nonrenewed in accordance with Section 3319.11 of the Ohio Revised Code. However, like Petitioners, the plaintiff claimed a right to reappointment because the board of education allegedly had failed to comply with its own policies when it decided not to renew his contract.

The *Depas* court granted summary judgment to the defendant board of education for exactly the same reason that the Courts below granted judgment after trial to Respondents in the instant case. The court stated:

> "Boards of education are creatures of statute and have only such jurisdiction as the statutes confer. They cannot confer upon themselves further jurisdiction or authority. See, Verberg v. Board of Education of the City School District of Cleveland, 135 Ohio St. 246 (1939). Thus, a board of education can neither limit nor enlarge its statutory power pursuant to R. C. 3319.11 not to re-employ a teacher on a limited contract by self-imposing a requirement that the re-employment of a principal or teacher shall be determined by specified factors other than the one statutory requirement that the board give written notice of non-renewal before April 30."

Clearly, the *Depas* case is directly on point and further supports Respondents' contention that the writ of certiorari should be denied.

CONCLUSION

For reasons set forth herein, and in Respondents' Brief in Opposition to Certiorari, Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

JOHN F. LEWIS
JAMES H. WOODRING
JOHN T. MEREDITH
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200
Attorneys for Respondents

APPENDIX

DECISION OF THE COURT OF APPEALS IN DEPAS V. HIGHLAND LOCAL SCHOOL DISTRICT BOARD OF EDUCATION

(Dated December 15, 1976)

No. 657

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
MEDINA COUNTY)

CHRIS DEPAS,
Plaintiff-Appellant,

v.

HIGHLAND LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS OF MEDINA COUNTY, OHIO
CASE NO. 30786
75 CIV 1004

DECISION AND JOURNAL ENTRY

This cause was heard October 28, 1976, upon the record in the trial court and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM.

Chris Depas, the plaintiff-appellant, was employed by the defendant-appellee, the Highland Local School District Board of Education (hereinafter the Board), under a one year limited contract as a principal for the 1974-75 school year. The contract expired June 30, 1975.

For purposes of this appeal, we assume that at the time of his employment the Board had adopted a series of employment policies relating to the employment of teachers and administrative personnel. These policies provided in part that the re-employment or promotion of a principal or teacher was to be determined by certain enumerated factors, nine in number.

Prior to April 30, 1975, the Board, upon the recommendation of the County Superintendent of Schools, voted unanimously not to renew Depas' contract as a principal for the 1975-76 school year. Depas was notified in writing before April 30, 1975, of the Board's decision.

Contending that the Board's decision was made without evaluation or considering his performance in accordance with its own employment policies, Depas filed suit seeking reinstatement as principal and for money damages. The Board answered and filed a motion for summary judgment. Affidavits were filed; a hearing was had; briefs were then submitted after which the referee, hearing the matter, recommended that the motion be granted. The court adopted the recommendations and entered judgment accordingly. Depas appeals and says the trial court erred:

"1. * * * in accepting the referee's recommendations and in entering summary judgment for the Board.

"2. * * * in concluding that (the Board's) nonrenewal of (his) teaching contract without adhering to its

duly adopted employment policies did not unconstitutionally deprive (him) of continued employment with the * * * Board."

These assignments overlap and are considered together.

Basically, Depas contends that the duly adopted employment policies of an Ohio educational system become an integral part of the employment contract of employees of the system, and that such policies must be considered and followed by the system before any action is taken which affects the employees' job status. Depas argues that where a board of education adopts policies relative to the re-employment of its employees it creates in those employees a constitutional property interest in their jobs and an expectancy of re-employment which cannot be destroyed by a board of education unless it complies with all the procedural requirements set forth in those policies. He cites *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) to support his position.

Ohio has established a statutory tenure system. Under that system a teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is not entitled to re-employment if the board of education, acting upon the recommendation of the school superintendent, gives that teacher a written notice on or before April 30 that he will not be re-employed. R.C. 3319.11.

Depas was employed as a principal under such a limited contract. For purposes of tenure "teacher" includes "principal." R.C. 3319.09. He received written notice on or before April 30 of the Board's intent not to re-employ him in the position. Thus, under statutory tenure provisions, his contract was properly terminated unless the Board's policy rules relative to re-employment became a

part of his contract and thereby gave him some constitutional property interest in his job and an expectancy of re-employment.

In *Ryan v. Aurora City Board of Education*, 540 F. 2d 222, 227 (6th Cir. 1976), the court said:

> "* * * We hold, however, that a non-tenured teacher has no 'expectancy' of continued employment, whatever may be the policies of the institution, where there exists a statutory tenure system. (Citations omitted). Since property interests are created by state law and not the Constitution, * * * the fact that the State limits the guarantee to only tenured teachers, necessarily negatives any property interest.
>
> "* * *."

Boards of education are creatures of statute and have only such jurisdiction as the statutes confer. They cannot confer upon themselves further jurisdiction or authority. *See, Verberg v. Board of Education of the City School District of Cleveland*, 135 Ohio St. 246 (1939). Thus, a board of education can neither limit nor enlarge its statutory power pursuant to R.C. 3319.11 not to re-employ a teacher on a limited contract by self-imposing a requirement that the re-employment of a principal or teacher shall be determined by specified factors other than the one statutory requirement that the board give written notice of non-renewal before April 30. See, *Ryan, supra.*

Additionally, under Ohio law, principals are not entitled to continuing contracts pursuant to R.C. 3319.02. *See, State ex rel. Saltsman v. Burton*, 154 Ohio St. 262 (1950) and *State ex rel. Saltsman v. Burton*, 156 Ohio St. 537 (1952).

For these reasons, we reject both assignment of error and affirm the judgment.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ WILLIAM H. VICTOR
Presiding Judge for the Court

MAHONEY, J. and BRENNEMAN, J. concur.